(19,309.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 234.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, PLAINTIFF IN ERROR,

vs.

HENRIETTA MEYER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, on a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henrietta Meyer, plaintiff, and The Supreme Lodge, Knights of Pythias, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
b of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of April, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

c UNITED STATES OF AMERICA,
State of New York, County of Queens, } ss:

I, David L. Van Nostrand, clerk of the supreme court of the State of New York, in and for the county of Queens and clerk of said county of Queens in said State of New York, do hereby certify that the following pages numbered from one to number 92 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Henrietta Meyer, plaintiff, against The Supreme Lodge, Knights of Pythias, defendant, as the same remains of record and on file in my office.

In testimony whereof, I have caused the Seal Queens County. seal of the said court to be hereunto affixed, at Jamaica in the borough — and county of Queens, city and State of New York, this 21st day of April, 1904, in the year of our Lord, one thousand, nine hundred and four, and of the Independence of the said United States of America, the one hundred and twenty-seventh.

D. L. VAN NOSTRAND, *Clerk.*

d Court of Appeals of the State of New York.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant

Case on Appeal.

Laurence G. Goodhart, attorney for defendant-appellant, 17 Park row, New York city.

J. Lawrence Friedman, attorney for plaintiff-respondent, 61–63 Park row, New York city.

1 *Case on Appeal.*

Supreme Court of the State of New York, Appellate Division, Second Judicial Department.

HENRIETTA MEYER, Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant.

Statement under rule 41.

This action was commenced by the service of the summons herein upon the defendant, The Supreme Lodge, Knights of Pythias, on the 30th day of December, 1901, on which day the defendant generally

appeared; the complaint herein was served on the 15th day of January, 1902; judgment was offered for three hundred and fifty-three dollars and seventy-six cents with interest and costs to that date, on the 28th day of February, 1902, and on the 4th of March, 1902, the defendant served its answer.

2 The names of the respective parties in full are:—Henrietta Meyer, plaintiff, and The Supreme Lodge, Knights of Pythias defendant. There has been no charge of parties or attorneys in this action.

The action was tried before Mr. Justice William J. Gaynor and a jury at a trial term of this court in the county of Queens on the 21st of October, 1902. A verdict having been rendered in favor of the plaintiff, judgment was entered herein on the 28th of October, 1902, for the sum of two thousand four hundred and sixty-two dollars and three cents, damages and costs, in the office of the clerk of Queens county, which was subsequently reduced by an order *nunc pro tunc* as of said last mentioned date to two thousand four hundred and forty-two dollars and three cents. The case is annexed to the judgment roll and contains all of the evidence taken upon the trial of this action.

(Same title.)

To the above named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated December 30th, 1901.

J. LAWRENCE FRIEDMANN,
Plaintiff's Attorney.

Office and post office address, No. 61–63 Park row, borough of Manhattan, New York city.

3 (Same title.)

SIR: Please to take notice, that the defendant Supreme Lodge, Knights of Pythias, hereby appears in this action, and that I am retained as attorney for it therein, and demand that a copy of the complaint and all papers in this action be served on me at my office, number 17 Park row, borough of Manhattan, city of New York, N. Y.

N. Y., December 30th, 1901.

Yours, &c., LAURENCE G. GOODHART,
Attorney for Defendant.

Office and post office address, 17 Park row, N. Y. city, N. Y.

To J. Lawrence Friedmann, Esq., plaintiff's attorney.

(Same title.)

The plaintiff appearing herein by J. Lawrence Friedmann, her attorney, alleges:

First. That the Supreme Lodge, Knights of Pythias, is and at all the times hereinafter mentioned, was a fraternal mutual benefit corporation, incorporated by acts of Congress and organized and existing under and by virtue of the laws of the United States of America and having during the same times a subordinate branch, known as the Endowment Rank, acting under its authority and subject to its control with branches of the same in the State of New York, and having authority therein to act as a fraternal mutual benefit corporation.

Second. That on or about the 28th day of September, 1894,
4 Emanuel Meyer, plaintiff's intestate, was a member in good standing of the said Endowment Rank, Knights of Pythias, section No. 783, and that said defendant duly issued to said Emanuel Meyer its policy No. 48,028, whereby said defendant, in consideration of the payment by him of the membership fee and of all monthly payments, assessments and dues, as required, undertook, agreed and covenanted to insure the said Emanuel Meyer in the sum of two thousand dollars and duly executed to said Emanuel Meyer its policy No. 48,028; a copy of which policy is hereto annexed marked Exhibit A. That by and in accordance with the terms of said policy, the said defendant duly promised and agreed to pay to Hattie Meyer, the wife of said Emanuel Meyer, the sum of two thousand dollars upon the death of said Emanuel Meyer.

Third. That thereafter, and on or about the 29th day of September, 1900, the said Emanuel Meyer died, and that thereafter and on or about the 20th day of October, 1900, the plaintiff duly gave the defendant due notice and satisfactory proof of death of said Emanuel Meyer and duly performed all the conditions required to be performed by her by and in accordance with the terms of said policy, and the said defendant duly accepted said proofs of the death of said Emanuel Meyer.

Fourth. That the said Emanuel Meyer during his lifetime duly performed and complied with all the conditions, provisions and agreements in said policy to be covenanted and performed by him, and that upon the death of the said Emanuel Meyer and the filing of due notice and proof of said death and acceptance thereof by said defendant, there became and was due to this plaintiff the sum of two thousand dollars, which sum the plaintiff duly demanded of said defendant.

5 Fifth. That the plaintiff herein, Henrietta Meyer, was the wife of the said Emanuel Meyer, at the execution of the aforesaid policy and at the time of his death, described in said policy as "Hattie Meyer."

Wherefore, the plaintiff demands judgment against said defendant for the sum of two thousand ($2,000) dollars with interest from

the 29th day of September, 1900, besides the costs and disbursements of this action.

J. LAWRENCE FRIEDMANN,
Attorney for Plaintiff.

Certificate of Membership.

No. 48028. Amount $2000.

Endowment Rank of the Order of Knights of Pythias.

This certificate witnesseth, that Emanuel Meyer is a member of section No. 2179 of the Endowment Rank, Knights of Pythias of the World, said membership being based upon evidence received that he is a membar in good standing of a subordinate lodge of the order of Knights of Pythias, and upon the declarations, representations and agreements made in his application bearing date of September 6th, 1894, and the statements certified by him therein to the medical examiner, which application is filed in the office of the board of control of the Endowment Rank and made a part of this contract.

In consideration of the payment by said member of the prescribed membership fee and of the payment hereafter to said Endowment Rank of all monthly payments, assessments and dues as re-
6 quired, and the full compliance with all the conditions herein contained and with the laws governing this rank, now in force or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or the board of control of said rank, and shall be in good standing under said laws, the board of control of the Endowment Rank, Knights of Pythias of the World, will pay to Hattie Meyer, his wife, the sum of two thousand dollars out of the endowment fund of the rank in accordance with, and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death, and good standing in the rank at the time of death, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations subscribed to by said member in his application and to the further conditions and agreements hereinafter named; and provided also, that this certificate shall not have been surrendered by said member or cancelled at his request and another certificate issued in accordance with the laws of the rank.

Provided, further, that the beneficiary herein designated shall acquire no interest whatever in the certificate, nor in the endowment fund, until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made. In case of the death of said beneficiary during the lifetime of the member, the benefit accruing under this certificate shall be payable as provided for in article VI, section 1 of the General Laws of the Endowment Rank. And it is un

derstood and agreed that any violation of the within mentioned conditions, or the requirements of the laws now or hereafter in force governing this rank, shall render this certificate and all
7 claims thereunder null and void, and the said Endowment Rank shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World, at Chicago, Illinois, this 20th day of September, 1894.

J. A. HINSLEY,
President Board of Control.

Attest: H. D. STOLKE,
Secretary Board of Control.

I hereby accept this certificate of membership subject to all the conditions therein contained.

Signature of member. EMANUEL MEYER.

Dated at New York this 28th day of September, 1894.

Attest: LOUIS RIEGEL,
Secretary Section 2179.

Verified January 11th, 1902.

(Same title.)

The defendant hereby offers to allow judgment to be taken against it herein by the plaintiff for the sum of $353.76, together with interest from the 29th day of September, 1900, up to and including the date hereof, with costs.

Dated at the city of New York this 20th day of January, 1902.

LAURENCE G. GOODHART,
Attorney for Defendant.

To J. Lawrence Friedmann, Esq., attorney for plaintiff.

8 STATE OF NEW YORK, }
County of New York, } ss.:

Laurence G. Goodhart, being duly sworn, deposes and says:

I. That he is the attorney for the defendant in the above entitled action.

II. That deponent is duly authorized by said defendant to make the foregoing offer of judgment on behalf of said defendant, and has subscribed the same pursuant to such authority.

LAURENCE G. GOODHART.

Sworn to before me this 20th day of January, 1902.

J. M. ROSEBERRY LONG,
Notary Public, New York Co.

(Same title.)

The defendant above named by Laurence G. Goodhart, its attorney, answering the complaint of the plaintiff, respectfully shows to this honorable court:

First. It admits the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "first."

Second. Upon information and belief, it admits that on or about the 28th day of September, 1894, Emanuel Meyer was a member in good standing of said Endowment Rank, Knights of Pythias, and it alleges that on or about said date, the defendant duly issued to said Emanuel Meyer a certain benefit certificate in form
9 similar to the one, copy of which purports to be annexed to the complaint of the plaintiff, but it has no knowledge or information sufficient to form a belief as to whether the instrument, copy of which purports to be annexed to said complaint is the benefit certificate so issued by the defendant to the said Emanuel Meyer on or about said 28th day of September, 1894.

Third. Upon information and belief, it admits so much of the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "third" as alleges "that on or about the 28th day of September, 1900, the said Emanuel Meyer died, and that thereafter and on or about the 20th day of October, 1900, the plaintiff gave the defendant notice and proof of death of said Emanuel Meyer," but it denies each and every of the other allegations in said paragraph or subdivision of the plaintiff's complaint contained.

Fourth. Upon information and belief, it admits that the plaintiff has demanded of the defendant the sum of two thousand ($2,000.00) dollars, but it denies each and every other allegation in the paragraph or subdivision of the plaintiff's complaint marked "fourth" contained, and it denies that the sum of two thousand ($2,000) dollars, or any sum whatsoever became and was due to the plaintiff except as hereinafter alleged.

Fifth. It admits the allegations contained in the paragraph or subdivision of the plaintiff's complaint marked "fifth."

Sixth. Upon information and belief, it denies each and every allegation in said complaint contained not heretofore specifically admitted, qualified or modified.

Seventh. Further answering the complaint of the plaintiff,
10 and for a further, separate and distinct defense thereto, the defendant alleges:

1. The defendant reiterates the foregoing with the same force and effect as if here fully and at length set forth.

2. That on or about the 6th day of September, 1894, at the city of New York, in the State of New York, one Emanuel Meyer, mentioned and described in the complaint of the plaintiff, made a certain application in writing upon the form furnished and prescribed by The Supreme Lodge, Knights of Pythias, a fraternal, mutual benefit corporation, incorporated by acts of Congress, under the laws of

the United States, this defendant, to be admitted to and become a member of the Endowment Rank of the order of Knights of Pythias, which is not a corporation but a subordinate branch of the Supreme Lodge, Knights of Pythias, acting under the constitution and by-laws of The Supreme Lodge, Knights of Pythias, this defendant, and under such other laws for its guidance, and for the guidance of its members, as have from time to time been made by the said Supreme Lodge, Knights of Pythias, this defendant.

That in said application, in consideration of the Supreme Lodge, Knights of Pythias, accepting the said Emanuel Meyer as a member of the Endowment Rank of the Knights of Pythias, and the issuance to him of a benefit certificate, the said Emanuel Meyer expressly contracted and agreed as follows:

"I hereby declare that I am a member in good standing of the order of Knights of Pythias, that I am not now a member of the Endowment Rank, Knights of Pythias, have never been rejected as an applicant thereof, and that I am in sound, mental and physical condition; and it is further declared that the foregoing
11 answers and statements, whether written in my own hand or not, together with the answers and statements made, or to be made, to the medical examiner in the continuance of this application are warranted to be full, complete and true, and shall together with all the agreements hereinafter made, form the basis of any certificate of membership issued hereon. It is agreed by myself and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner or in any certificate of health that may be hereafter given, or in the proofs of loss or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the laws of the rank or order, or severing in any manner whatever my membership or connection with the order or the Endowment Rank, said certificate shall be null and void, and all right, title and interest in and to the same as well as the rights of my heirs and beneficiaries to the benefits and privileges accruing to members in good standing of this rank shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material. The person soliciting or taking this application, and also the medical ex-
12 aminer, shall be held to be the agents of the applicant as to all answers and statements in this application.

"It is agreed that if death shall result by self-destruction, whether sane or insane, voluntary or involuntary, or if death is caused or

superinduced by the use of intoxicating liquors, or by the use of narcotics or opiates, or in consequence of a duel, or by the hands of justice, or in violation of, or attempt to violate any criminal law, then the certificate issued upon this application shall be null and void, and all claims on account of such membership shall be forfeited.

"It is agreed that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership, in the Endowment Rank Knights of Pythias, or on any certificate issued, upon this application, unless good and sufficient proof of death is furnished the board of control of the Endowment Rank within one year from date of death of the member, nor shall such action at law be maintained unless suit is commenced within two years from the date of the death of the member.

"It is agreed that membership shall not begin, and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board.

"In addition to the above provisions, I hereby agree that I will be governed, and this contract shall be controlled by all the laws, rules and regulations of the Supreme Lodge, Knights of Pythias of the World and of the board of control, of the Endowment Rank, governing said rank, now in force or that may hereafter from time to time be enacted by said Supreme Lodge or board of control, or submit to the penalties therein contained.

13 "To all of which I willingly and freely subscribe."

And this defendant alleges that said agreements, covenants, conditions and warranties were offered by the said Emanuel Myer to the defendant as a consideration for the contract.

And that the said Emanuel Meyer in further consideration of the promises and of his admission to the Endowment Rank, as aforesaid, and of the issuance of a benefit certificate to him, did expressly contract and agree to be governed and that his contract with the defendant and his beneficiary or beneficiaries should and would be governed, controlled and bound by all the laws, by-laws, rules, usages and regulations of the Supreme Lodge, Knights of Pythias, governing the Endowment Rank then in force, or which might thereafter be enacted by the Supreme Lodge, Knights of Pythias, and by the board of control of the Endowment Rank, governing said rank, and the endowment fund thereof, or submit to the penalties therein contained.

3. That in consideration of the conditions, agreements, covenants and warranties aforesaid on the part of the said Emanuel Meyer, to be by him kept and performed, the Supreme Lodge, Knights of Pythias accepted him as a member of the Endowment Rank aforesaid and issued to him a benefit certificate, as aforesaid.

4. That at the time that said Emanuel Meyer became a member of the Endowment Rank aforesaid and that the defendant issued to

him the benefit certificate aforesaid, the foregoing agreements, covenants, considerations and warranties were in accordance with the terms and by-laws of the defendant then in force and governing said Endowment Rank and the endowment fund thereof, and which
14 form the consideration for and part of the contract between the said Emanuel Meyer and this defendant and which bound the said Emanuel Meyer and his beneficiaries in accordance with the terms of the contract between him and the defendant.

5. That among certain laws, rules and regulations which had been adopted for the government of the members of the Endowment Rank of the Knights of Pythias and to which the said Emanuel Meyer was subject and which he had contracted and agreed to obey as part of the consideration for the payment by the Supreme Lodge Knights of Pythias, through its subordinate the Endowment Rank, to his beneficiary of the sum of two thousand dollars, was the following:

"* * * If the death of any member of the Endowment Rank heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel or at the hands of justice, or in violation or attempted violation of any criminal law, then the amount to be paid upon such member's certificate shall be a sum only in proportion to the whole amount as the matured life expectancy is to the entire expectancy at the date of admission to the Endowment Rank, the expectation of life based upon the American Experience Table of Mortality in force at the time of such death to govern.

"Provided that, in the case of members transferred to the fourth class (the present system), from either of the former classes, the date of such transfer shall be taken as the date of admission to the Endowment Rank in computing the amount to be paid as aforesaid
* * *"

15 6. And the defendant alleges upon information and belief that the death of the said Emanuel Meyer resulted from suicide, in that, the said Emanuel Meyer did deliberately kill himself at the city of Buffalo, in the State of New York, on or about the 29th day of September, 1900.

7. That pursuant to the terms of said by-laws and that contract, there became and was due and owing to the plaintiff from the defendant the sum of $353.76, and no other or further sum whatsoever, and that the defendant has offered judgment for the same with interest to the date of the offer of said judgment, and costs of the action up to said date, to wit, the — day of ——

Wherefore, the defendant offers judgment for the sum of $353.76 together with interest from the 29th day of September, 1900, up to and including the — day of ——, 1902, the date upon which offer of judgment was duly made, together with the costs and disbursements of this action which have lawfully accrued to the plaintiff up

to the — day of ——, 1902, the aforesaid date of the said offer of judgment, and the defendant demands that the complaint of the plaintiff be in all other respects dismissed, and that the defendant have all further costs and disbursements of this action.

LAURENCE G. GOODHART,
Attorney for Defendant.

Verified by attorney January 20th, 1902.

16 At a term of the supreme court, held in and for Queens county, at the court house, at Long Island City, Queens county, on the 21st day of October, 1902.

Present: Hon. William J. Gaynor, justice.

J. Lawrence Friedmann, for plaintiff.

Laurence G. Goodhart, for defendant.

(Same title.)

This cause having been called in its regular order on the calendar, on motion of J. Lawrence Friedmann, attorney for the plaintiff, ordered that a jury be called and this cause tried.

Jury duly drawn, called and sworn, or affirmed, and cause tried.

The jury retired in charge of a sworn officer, and subsequently they came into court, and their answer to the following question, "Did the deceased committ suicide," answer, No, the court thereupon directed judgment for the plaintiff for the sum of $2,240.66.

Defendant's counsel moved to set aside the verdict and for a new trial upon all the grounds specified under section 999 of the Code. Motion denied.

Thirty days' stay after service of notice of entry of judgment granted defendant.

5 % allowance to the plaintiff.

[SEAL.] JAMES INGRAM, *Clerk.*

(Same title.)

17 This action having come on regularly for trial before Hon. William J. Gaynor, one of the justices of the supreme court of the State of New York, and a jury, at a trial term of said court, held in the county court house of the county of Queens, on the 21st day of October, 1902, and after hearing all the evidence and allegations on the part of the plaintiff as well as on behalf of the defendant, and a verdict having been duly rendered in favor of the plaintiff and against the defendant for the sum of two thousand two hundred and forty-seven and 66/100 ($2,247.66) dollars and the costs having been duly taxed upon notice at the sum of two hundred and fourteen and 37/100 ($214.37) dollars.

Now, upon motion of J. Lawrence Friedmann, attorney for the plaintiff, it is

Ordered and adjudged, that the above named plaintiff, Henrietta Meyer, recover of the defendant, Supreme Lodge, Knights of Pythias,

the sum of two thousand two hundred and forty-seven and 66 / 100 ($2,247.66) — for which a verdict was rendered in this action, together with the sum of two hundred and fourteen and 37 / 100 ($214.37) dollars costs duly taxed by the clerk of this court making in all the sum of two thousand four hundred sixty-two and 3 / 100 ($2,462.03) dollars, and that the plaintiff have judgment for said amount and execution accordingly against said defendant.

JAMES INGRAM, *Clerk.*

Dated New York, October 28, 1902.

18 At a special term of the New York supreme court, held in and for the county of Kings, in the county court house thereof in said county, on the 12th day of November, 1902.

Present: Hon. Josiah T. Marean, justice.

(Same title.)

Upon reading and filing the annexed affidavit of Laurence G. Goodhart, duly verified the seventh day of November, 1902, and the stipulation in writing between the attorneys for the respective parties hereto, it is

Ordered that the judgment entered in the above entitled action in the office of the clerk of the supreme court of the State of New York, county of Queens, be and the same hereby is *nunc pro tunc* reduced as of the 28th day of October, 1902, from the sum of $2,462.03 to the sum of $2,442.03, and it is further

Ordered that the clerk of the court do mark the same upon the docket of this court accordingly *nunc pro tunc* as of said 28th day of October, 1902, and it is further

Ordered that the foregoing be and it hereby is amended without prejudice to either party of any right to enforce, resist, appeal from, reverse or modify the aforesaid judgment, as thus reduced, or each or any part thereof, and without prejudice to any of the proceedings heretofore had, except such reduction, or which may hereafter be had in the above entitled action.

Enter in Queens county.

J. T. M.
J. S. C.

Granted: November 12th, 1902.

CHARLES T. HARTZHEIM, *Clerk.*

19 At a trial term of the supreme court of the State of New York, held in and for the county of Queens, at the court house thereof, in said county, on the 23rd day of October, 1902.

Present: Hon. William J. Gaynor, justice.

(Same title.)

The issues in this action having come on for trial before Hon. William J. Gaynor, justice, on the twenty-first day of October, 1902, and the court having submitted to the jury for special verdict thereon the question, "Did Emanuel Meyer, the husband of the plaintiff, commit suicide?" and the jury having answered said question "*No,*" *and the defendant having* moved to set aside the verdict aforesaid on the judge's minutes, on the ground that the same is against the evidence, against the weight of evidence and contrary to law, and for a new trial upon the judge's minutes upon the same grounds, it is

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter in Queens county.

W. J. GAYNOR, *J. S. C.*

Granted Oct. 23, 1902.

JAMES INGRAM, *Clerk.*

(Same title.)

SIRS: Please take notice that the defendant, The Supreme
20 Lodge, Knights of Pythias, hereby appeals to the appellate division of the New York supreme court, for the second judicial department, from the judgment entered in the office of the clerk of the county of Queens on the 28th day of October, 1902, in favor of the above named plaintiff and against the above named defendant, for the sum of $2,442.03 damages and costs, entered upon the verdict of a jury at a trial term of this court, held in and for the county of Queens, and from the order denying the defendant's motion for a new trial herein, entered in the office of the clerk of the county of Queens on the 23rd day of October, 1902, and from each and every part of said judgment and of said order.

Dated New York, November 19, 1902.

Yours, &c., LAURENCE G. GOODHART,
Attorney for Defendant.

To J. Lawrence Friedman, Esq., attorney for plaintiff, and James Ingram, Esq., clerk of Queens county.

The Trial.

The issues in this action came on to be tried at a trial term of the supreme court of the State of New York, held on the 21st of October, 1902, before Hon. William J. Gaynor, justice, and a jury at the court house in Queens county. J. Lawrence Friedman, Esq., appeared for the plaintiff, and Laurence G. Goodhart, Esq., for the defendant.

21 DEFENDANT'S COUNSEL: We have the affirmative.

The COURT: The affirmative, is with the defence. They do not question any of the preliminary.

The certificate of membership issued to Emanuel Meyer; the application upon which said benefit certificate was issued; proofs of death submitted in this case; the proof of death made by the physician, Doctor Thornton, which he identified in the commission and the inquisition submitted as part of the proofs of death, and which is duly certified by the county clerk of Erie county, having been taken upon the body of Emanuel Meyer were received in evidence.

The testimony of ARTHUR MCCARTHY, M. D., a witness sworn on behalf of defendant, was read:

Direct examination by Mr. GOODHART:

I am a physician by profession; in the month of September, 1900, I was engaged at the Buffalo General hospital; in the city of Buffalo; my position at the hospital during that month was house physician; I do remember the case of one Emanuel Meyer; I saw him at the hospital; the day and hour I first saw him was September 29th, 1900, at about 8.45 a. m.

Q. How long did he remain at the hospital?

PLAINTIFF'S COUNSEL: I object to this testimony on the ground that it is incompetent and improper, also that it is privileged, that any knowledge obtained by this physician was obtained while he was acting as physician for the deceased, and is not admissible unless expressly waived at the trial, and we hereby state that we do not waive any of the privileges given to us by sections 834 and 836 of the Code, and hereby object to its admissibility.

The objection was sustained and the defendant excepted.

22 From the time he was brought in there until he died I was in and out, I was not constantly present; my assistant, Dr. Thornton, was there continuously, but I was in and out; I was present at the moment of his death; I say that Dr. Thornton was not there, but one or the other was there continuously; from the time he came there to the moment of his death; I entered college in 1896, the University of Buffalo; commenced my medical studies.

The plaintiff admitted that he is an expert, that he is a physician, duly qualified to practice in this State at the city of Buffalo at the time in question.

The WITNESS: I was admitted to practice. I was graduated from the university in April, 1899, and I presume my admission to practice dated from the time of my State board examination which was in the following May; May, 1899; I was licensed by the State board to practice and I have practiced medicine ever since; I state that I

first entered the General hospital on the first of May, 1899; the position I first occupied there was junior surgeon; I state the various positions and the time I occupied them in their order; there are three positions in the plan at the General hospital. A man entering the hospital has an election whether the surgical or medical service. I chose the medical service. By choosing the medical service, it was necessary that I put in my first six months as junior surgeon, which I did; next, at the expiration of six months I was transferred to senior physician; I became senior physician at the General hospital, that would be in November, 1899; I occupied that position until the first day of May, 1900, that is, for six months, and from the first day of May, 1900, to the first of November, 1900, I was house
23 physician; and it was while I was house physician that this man, Emanuel Meyer, was brought there; I was at breakfast when he was brought into the room; I was called from the table; I immediately went to see him; he was put into a private room.

Q. Let us have your complete diagnosis of the case at that time?

PLAINTIFF'S COUNSEL: We renew our objection on all the grounds stated.

The COURT: I have already ruled.

The defendant excepted.

Q. Will you give us the details of his condition?

Objected to; objection sustained and the defendant excepted.

Plaintiff admitted that Dr. Bruso is a duly qualified physician, admitted as such, qualified and licensed to practice medicine in Buffalo, in this State.

The defendant contended that the relationship of physician and patient did not arise between Dr. Bruso and Mr. Meyer, and therefore desired to read the examination.

The COURT: If he did not treat him and he was not his physician, read it all.

C. FRANK BRUSO, M. D., a witness called and sworn on behalf of the defendant testifies as follows:

Direct examination by Mr. GOODHART:

My profession or occupation is physician and surgeon; I commenced to study medicine in 1882, at Lockport. I first com-
24 menced to study medicine at a regular medical institution in the season of 1884–1885, at the medical department of the University of Buffalo; I continued my studies there till I was graduated, March first, 1887; I have not continuously practiced medicine in the city of Buffalo since then; I have continuously practiced medicine ever since; in Buffalo and through the State and in the United States Army. On the 29th of September, 1900, my office was at 380 Main street, Buffalo; that is diagonally across the street from the

Iroquois hotel; I suppose that I remember the 29th of September, 1900. I remember the case of Emanuel Meyer; my first connection with that case was that I think I was called that morning; I was called that morning I think, about 6:50 a. m., by one of the bell boys of the Iroquois hotel; Iimmediately got up. I got up and slowly dressed myself, did not hurry, particularly, and in about ten minutes after that another boy came and wanted me to hurry.

Q. Will you state what the first boy said.

The plaintiff objected to it as hearsay and irrelevant and incompetent; the objection was sustained and the defendant excepted.

In about ten minutes another boy came.

After the second bell boy came, I hastened and went right over; I was only a minute or two behind him; I went up to the fellow's room; I don't remember the number; I don't remember whether the door was open; I think not; it was not locked; I went into the room.

I found a man lying in bed there, suffering intense pain and vomiting.

The plaintiff objected to all except the first part of the answer "found the man in bed lying there."

25 The COURT: Did this doctor treat him?

DEFENDANT'S COUNSEL: He inserted something hyperdermically into the man against his wish which did not help him, I presume.

The objection was sustained and the defendant excepted.

The deposition thus offered in evidence by the defendant and, under the last ruling of the court, thus excluded was as follows:

Deposition Offered and Excluded.

Q. Now, did you have any conversation with the man you found in bed?

A. I did.

Q. Will you state the conversation?

A. I asked him what he had been doing, and he told me it was none of my damned business, that he didn't want me in there, and he wanted me to get out of there. That was about all the conversation I had with him at that time; I looked around the room and over on the dresser; I found, I don't know whether it is a medium or large sized box of "Rough on rats," which he afterwards told me he had taken; the condition of that box was empty; there was not any of the contents left; I say that he told me he had taken it, I asked him why he had taken it, and he said because he wanted to die, and I asked him about his family affairs, if he had a wife and children, and he said yes; I think he said he had a wife and four

children,—that I don't remember distinctly; I knew he told me he had some children; I asked him if he didn't want to get well, and he said "No." He didn't want me to do anything and he wanted me to keep away from him; I then prepared an hyperdermic injection of strychnine and tried to keep up his heart, and stimu-
26 lated him so he wouldn't die in the Hotel Iroquois, because I knew he was going to die; and when I was going to give him that hypodermic, he said "You God damned son of a bitch keep away from me. Didn't I tell you before to keep away." I paid no attention to him and gave him an hypodermic, a sixtieth grain sulphate of strychnine is in an hypodermic injection; he was suffering such intense pain that I afterwards gave him an hypodermic of morphia to make him more comfortable while he lasted; of morphia and atropine.

Q. What, if you know, was the cause of the condition of the man in which you found him?

A. Arsenical poisoning.

Q. On what do you base the statement that he was suffering from arsenical poisoning?

A. He had the evidence of taking some corrosive poison; he also had all the symptoms of arsenical poisoning. I would have based my opinion that he was suffering from arsenical poison upon the symptoms which he exhibited to me at the time that I first saw and examined him, even if he had not told me; combining the symptoms which were exhibited to me by the patient in question with the statements made to me, I am able to say what caused his condition, as I found him. I state that it was cause- by arsenical poisoning; there could not have been anything else that would have brought about the condition in which I found him. My experience with cases of poisoning has been very extensive in hotel work, in hospitals and in institutions I have been connected with. In my experience I have seen probably fifty cases of arsenical poisoning.

The deposition of Dr. William Irving Thornton, whose po-
27 sition in this case is the same as Dr. McCarthy's was excluded and the defendant excepted.

The deposition thus offered to be read is as follows:

Deposition Offered and Excluded.

WILLIAM IRVING THORNTON, M. D., of 152 Jersey street, in the city of Buffalo, county of Erie, and State of New York, by occupation a physician, age 24 years and upwards, being duly and publicly sworn pursuant to the direction hereto annexed upon open commission, and examined on the part of the defendant, doth depose and say as follows:

Direct-examination by Mr. GOODHART:

Q. What is your occupation?

A. Physician.

Q. When did you first commence the study of medicine?
A. The fall of 1896.
Q. Where?
A. University of Buffalo.
Q. How long did you continue your studies?
A. Three years until the spring of 1899.
Q. You were graduated at that time?
A. Yes, sir.
Q. Did you pass the examination of the State medical board?
A. Yes, sir.
Q. And received a license to practice?
A. Yes, sir.
Q. And have continuously practiced since that time as a physician in the city of Buffalo?
A. Yes, sir.
Q. Did you, at any time, occupy any position in the General hospital in the city of Buffalo, county of Erie, and State of New York?
A. Yes, sir.
28 Q. State the dates between which you occupied any position there and what they were?
A. I entered the hospital the last of September, I have forgotten the date—1899.
Q. And what position did you assume there?
A. The first position.
Q. Your first position was what?
A. Junior surgeon.
Q. How long did you continue in that position?
A. That was for a few months, then I was temporary senior surgeon, that was for about two months more.
Q. That brings us up to about what date, as nearly as you can give it?
A. Until nearly the first of the next year.
Q. Then what position, if any, did you occupy there?
A. Senior physician.
Q. That is immediately inferior to the house physician, is it not?
A. I beg your pardon. I became junior surgeon again, because this position that I occupied was simply temporary, then I was junior physician.
Q. When did you become junior physician?
A. I was junior physician first and then occupied temporarily the position of senior surgeon, then became junior physician again until the next spring, the first of next May?
Q. 1900?
A. Yes, sir, then became senior physician.
Q. Up to what time?
A. The following November.
Q. The position of senior physician is immediately inferior to house physician?
A. Yes, sir, sometimes called assistant house physician.

Q. Your next superior being the house physician?
A. Yes, sir.
Q. Who was your house physician in September, 1900?
A. Dr. McCarthy.
29 Q. Do you remember the case of Emanuel Meyer?
A. Yes, sir.
Q. Do you know when he was brought into the hospital?
A. September 29th, 1900.
Q. When did you first see him?
A. I saw him between a quarter of and nine o'clock in the morning of that day.
Q. How did you come to see him?
A. The case was reported at the breakfast table that there was a serious case brought up to one of the rooms. I went up with Dr. McCarthy to see the case.
Q. Did you yourself make an examination as soon as you got to the room?
A. Yes, sir.
Q. You assisted Dr. McCarthy in making the examination?
A. Yes, sir.
Q. State what you found in the case of Emanuel Meyer on this first examination?
A. When I first saw him he was on a bed there. The condition of his extremities was extremely cold.
Q. What was the color of them?
A. They were blue, that is, there was a dusky bluish tinge to the extremities.
Q. The condition of the temperature was what?
A. To all appearances, to the touch, to the feeling, I should say that his temperature was below normal.
Q. I mean the condition of the temperature of the extremities to the touch?
A. Extremely cold.
Q. The color was dusky blue?
A. Yes, sir.
Q. What was the condition of the heart?
A. The heart was very irregular and very weak.
Q. Was the pulse strong or weak?
A. I felt no pulse at all. I attempted to take it and found no pulse whatever.
Q. At the wrist?
A. Yes, sir.
Q. How did you discover the condition of the heart?
A. By a stethoscope.
30 Q. Applied where?
A. Over the area of the heart.
Q. What was the condition of the respiration?
A. The respirations were frequent and I don't remember that

there was anything that struck me at the time, except frequent respirations.

Q. Are you able to say whether they were shallow or deep?

A. I don't think they were either. I don't know just how to answer that, because they didn't strike me either way, simply the frequency that I noticed.

Q. What called it to your attention was the frequency of the respirations?

A. Yes, sir.

Q. Do you know what his temperature was during this first examination?

A. I did not see it taken. It was reported by the nurse that it was sub-normal.

By Mr. WARNER: I move to strike out the answer on the ground that it is hearsay.

Q. What is the normal temperature of a human being?

A. 98 6/10 degrees Fahrenheit.

Q. You mean by that in health?

A. Yes, sir.

Q. What is the definition of sub-normal temperature of the human body?

A. Temperature which is below 98 6/10 degrees taken in the mouth.

Q. Do you know whether Meyer's temperature was taken?

A. I do not.

Q. Was it taken in your presence?

A. Not to my knowledge. That is, I might have been in the room and not have seen it taken.

Q. What other condition besides those you testified to did you find at the first examination?

A. I noticed that there was a cold sweat over his entire body, particularly at the extremities, the hands and the feet.

31 Q. What, if anything, can you say as to the condition as to pain?

A. On questioning, he complained of pain over the epigastric region, although he did not show any evidences of it without questioning—that is, not to writhe to any extent.

Q. He was not writhing?

A. No.

Q. He laid quiet?

A. Yes, sir.

Q. You say upon questioning? Did you have any conversation with Meyer?

A. Yes, sir.

Q. State that conversation?

By Mr. WARNER: Same objection to the conversation as in Doctor McCarthy's testimony.

A. The questions were about the same. I would question him when Dr. McCarthy was out simply to get a more definite statement.

Q. Will you state, as nearly as you can, the conversation between you and Meyer from the time of his entrance to the hospital to his death, giving us, as nearly as you can, your words and his?

By Mr. WARNER: Same objection.

A. I asked him subsequently to Dr. McCarthy's questioning him, if he had taken anything, and he said he had. I asked him what he had taken, and he said a white powder. I asked him what the powder was and he gave me no definite answer.

Q. Did he say anything, and if so what were the words which he used in answering that question?

By Mr. WARNER: Same objection.

A. He said he took a powder that he had found in one of the drawers in the hotel did up in a paper.

Q. That is all the reply that he gave you?

A. Yes, sir.

Q. Did you have any further conversation with him?

A. I asked him if he was having any pain, and he said
32 "Yes," and I asked him where, and he made a movement with his hand in the region of the stomach.

Q. Is that all the conversation you had with him from the time of his entrance to the hospital to the time of his death?

A. I asked him where he lived and he gave an address of fifty something West 112th street, New York city.

Q. Is that all the conversation?

A. I asked him why he had taken this powder.

By Mr. WARNER: Same objection to all the conversation.

A. And he said that he was in hard luck, that he had lost money in the races and in gambling. That is the entire statement, as I remember it. I believe that I requestioned him, and got about the same as that over again.

Q. Can you state what his mental condition was during this questioning and answering?

A. The mental condition was clear.

By Mr. WARNER: I object to that as calling for the conclusion of the witness.

Q. Upon what did you base your answer that the mental condition was clear?

A. His statements were ready without any hesitation, the words were clear and his statement was perfectly connected.

Q. Now, Doctor, will you state what was done for Meyer by yourself at the time you completed this first examination upon his entrance to the hospital.

A. The ordering was done by Dr. McCarthy. I did not order anything directly myself.

Q. You heard Dr. McCarthy's testimony on that point?

A. Yes, sir.

Q. Is it correct to your knowledge?

A. Yes, sir.

Q. Did you see the orders complied with?

33 A. I saw most of them at that time. That is, I cannot state definitely whether I saw all the hypodermics given.

Q. Now, come down to the statement of Dr. McCarthy that hydrated sesquioxide of iron was administered. Who administered it?

A. Dr. McCarthy with my assistance.

Q. How much hydrated sesquioxide of iron was given first by yourself and Dr. McCarthy?

A. I cannot state the definite amount.

Q. How near can you approximate it?

A. Why, of the solution I know there was at least a pint, which was placed in a pint pitcher, and I think a large proportion of that was given.

Q. You think the larger part of the pint was given?

A. Yes, sir, there was some given by mouth afterwards.

Q. Did you see that part which was given?

A. Yes, sir.

Q. And you assisted him in giving the first dose?

A. Yes, sir.

Q. You have heard the testimony of Dr. McCarthy as to the cleansing of the stomach and the vomiting from the stomach. Is that correct to your recollection?

A. Yes, sir.

Q. And you assisted in that operation?

A. Yes, sir.

Q. How often did you see Meyer from that time to his death?

A. I cannot recall the number of times.

Q. You were in and out continuously?

A. Yes, sir.

Q. Will you state the progress of Meyer's case from the time of his first treatment to his death from your personal knowledge?

A. The condition improved slightly after the stimulation which he had had.

34 Q. And which Dr. McCarthy has testified to?

A. Yes, sir.

Q. And which is correct?

A. Yes, sir.

It is stipulated that all objections to the questions and motions to strike out the answers in Dr. McCarthy's testimony shall apply to the same or similar questions and answers in Dr. Thornton's testimony.

Q. State now the progress of Meyer's case from your personal knowledge up to the time of his death from the completion of this first treatment?

A. The improvement, as I stated, was very slight, and it lasted, I should think, possibly half or three-quarters of an hour, and after that his general condition began to fail, and he lapsed into unconsciousness and died about 10.20.

Q. The immediate cause of his death being?

A. Heart failure.

Q. Doctor, you have heard the testimony of Dr. McCarthy, and you recollect your own as to corresponding symptoms exhibited by Meyer. Can you state whether Meyer died from natural or unnatural causes?

A. Unnatural causes.

Q. Was his death caused by physical injury?

A. No, sir.

Q. Can you say what other class of unnatural causes caused the death of Emanuel Meyer?

A. Why, some poison taken into the system.

Q. From your personal knowledge of Meyer's case, by which I mean the symptoms exhibited at the time of your first examination and the progress of his case to his death, can you state what poison caused his death?

A. I cannot state positively.

Q. What poisons could have produced the conditions present in Meyer's case, from your personal knowledge of the same?

A. The poison that would come to me first would be arsenic.

35 Q. Would arsenic account for all you know of Meyer's case?

A. Yes, sir.

Q. Would anything else which you know account for every condition present in Meyer's case?

A. Not that I know.

Q. You have stated the immediate cause of Meyer's death to be heart failure. Can you state what was the actual condition of the heart which was the immediate cause of death?

A. It was degeneration apparently of the heart muscle, myocarditis.

Q. Could myocarditis be the result of the administration of arsenic?

A. It could.

Q. Is it not true that cold cyanosed extremities is a characteristic of arsenical poisoning?

A. I can't say it is characteristic of it. It is one of the symptoms.

Q. In cases of arsenical poisoning, what is the mental condition?

A. It is generally clear.

Q. You have heard Dr. McCarthy testify, and you have said that

Mr. Meyer vomited part of the contents of his stomach. Did you observe the nature of that?

A. Only in a rough way. Simply noted it was a fluid, dark colored vomit.

Q. Is that a symptom of arsenical poisoning?

A. Do you mean the vomiting or the character of it?

Q. Vomiting and the character of it?

A. I don't think you can say the character is; the vomiting is.

Q. Is there any particular character to the vomit in arsenical poisoning—one exclusive of all others?

A. I think not.

Q. But vomiting is?

A. Yes, sir.

Q. Was there retching present?

A. The ordinary retching of vomiting was present.

Q. What, if anything, can you say as to the stool?

A. I didn't see the stools personally. I only know from hearsay.

36 Q. Did you see Meyer after he died?

A. Shortly after he died.

Q. Did you make any examination of the body at that time?

A. No, sir, except to see definitely if he was dead.

Q. And he was dead?

A. Yes, sir.

Q. Now, Doctor, having in mind all the aspects of the case as you know it, how do you account for his death?

By Mr. WARNER: Objected to as incompetent and immaterial.

Q. What caused his death, if you know?

A. The degeneration of the heart muscle which caused the heart failure?

Q. That was the immediate cause of death?

A. Yes.

Q. Will you tell us, if you can, what was the contributing cause of death?

A. In my belief, it was arsenic.

Q. What is that belief founded upon?

A. On the symptoms which the man presented when he entered the hospital, on the course of the disease, or the condition, on the sequence of symptoms, and on the man's statements that he made to me on questioning him what he took.

Q. Do you include in that, the manner in which he died?

A. Yes, sir.

Q. You didn't have anything to do with the preparation of the certificate of death?

A. No, sir.

Q. Was Meyer brought to the hospital in an ambulance?

A. Yes.

Q. Did you have any conversation with the ambulance physician who brought him?

A. No.

Q. I show you a paper partly written and partly printed. Will you state, if you know, in whose handwriting the written parts of that is written, down to the words "attending physi-
37 cian"?

A. Yes, sir.

Q. Will you state in whose handwriting that is?

A. In mine.

Q. Is that your signature above the words "attending physician"?

A. Yes, sir.

Q. And did you swear to the contents of this document?

A. Yes, sir.

Q. As therein appears and before the notary public whose name is thereto subscribed?

A. Yes, sir.

By Mr. GOODHART: I offer in evidence the certificate of the physician and undertaker.

By Mr. WARNER: I object to it as being incompetent and immaterial.

Admitted in evidence and marked Defendant's Exhibit 3, June 20th, 1902.

Cross-examination of WILLIAM IRVING THORNTON by Mr. WARNER:

Q. Dr. Thornton, are you able to state positively, excluding from your mind statements made to you by the man Meyer, whether or not the man died from arsenical poisoning?

A. No, not positively.

Q. Was it not a fact, Doctor, that Meyer's myocarditis, together with acute indigestion, could have produced the symptoms shown by Meyer?

A. You mean by that the entire symptoms?

Q. All the symptoms, excluding any statements made to you by him?

A. I think they could not.

Q. The pulsation and the temperature and the cyanosed condition could have been caused by myocarditis, could they not?

A. You mean the pulsation of the heart—the heart beat?

38 Q. I understand you were not able to get his wrist pulse?

A. There are different forms of pulsation—pulsation of the neck.

Q. You took it at the heart. Those symptoms could have been produced by myocarditis, could they not?

A. The pulsations could, that is, the lack of pulsation.

Q. And the cyanose condition?

A. Yes, sir.

Q. The purging, diarrhœa and the other symptoms could have been induced by acute indigestion, could they not, Doctor?

A. The first two I should say, and as to the others no. There was an exception I took to your first statement.

Q. What symptoms were shown by the man Meyer, which could not possibly have been produced by myocarditis, coupled with acute indigestion?

A. I think the icy extremities could not have been produced by any such cause.

Q. Is it not a fact that the cyanose condition, connected with the icy extremities, are symptoms of myocarditis?

A. I don't think that the extent of that icy condition could be present in myocarditis uncomplicated by arsenical poisoning.

Q. If a person has myocarditis, the heart is not able to send the blood to all the parts of the body?

A. If it has not compensated.

Q. Well, when there is myocarditis, the heart is not as competent as it would be if he did not have myocarditis?

A. You might have a competent heart with myocarditis.

Q. Be able to send the blood to all parts of the body in myocarditis?

A. Yes, sir, the heart might compensate.

Q. Well, Doctor, if a person has myocarditis, and a very strong case of it, or say that he is weak, just as you want to put it the heart does not compensate at all, the blood would not be sent to the extremities of the body, would it?

A. Not properly sent.

39 Q. And if the blood was not properly sent to the extremities the extremities would be cold, would they not? I don't necessarily mean to the freezing point?

A. They would be cold.

Q. And if the heart was very weak in a case of myocarditis, the extremities might have been as cold as the extremities of this man Meyer?

A. I think not.

Q. Did you take the temperature of the extremities of Meyer?

A. I did not.

Q. You don't know how cold they were, do you?

A. How do you mean take the temperature of the extremities?

Q. You say they were pretty cold?

A. I felt by the sense of feeling with my hand.

Q. And what was the temperature?

A. I don't know.

Q. Do you mean to say then, Doctor, not knowing how cold his extremities were, that there could not be a case of myocarditis where the extremities were as cold as they were in the man Meyer?

A. I think not.

Q. Do you mean to state that?

A. In my experience I have never seen as cold extremities in a

heart that did not compensate from myocarditis. I never saw as cold extremities as I did in this case.

Q. And that is what you base your opinion on in this case. Because you never saw such cold extremities?

A. Yes.

Q. On what else do you base your conclusion?

A. Authorities state this same proposition, that extremely cold extremities come from case of poisoning, from arsenic.

Q. Upon what do you base your conclusion that the extremities could not be as cold in a case of myocarditis as they could be in a case of arsenical poisoning?

40 A. Because, simply from my experience, I base my own statement from the experience that I have had. I have seen a number of cases of myocarditis, of heart failure, I have noticed the cold extremities, and in cases of myocarditis I never noticed the extreme cold I did in this case.

Q. And you cannot possibly conceive of any case of myocarditis where the extremities could be as cold as the extremities of this man Meyer?

A. No, sir, I could not.

Q. The only difference in the symptoms between those exhibited by the man Meyer, and the symptoms which would be exhibited by a person suffering from myocarditis, coupled with acute indigestion, were extreme cold feet? Is that correct?

A. Which form of myocarditis do you refer to?

Q. Conceive any possible severe form that would cause the cyanose condition and the weak pulsation?

A. Possibly the severe form of indigestion and acute myocarditis might produce all the symptoms, excepting the icy cold extremities and the clear mentality.

Q. And this could not possibly be—these cold extremities—from the myocarditis?

A. Not to my belief.

Redirect-examination by Mr. GOODHART:

Q. In answer to the question as to the cold conditions of the extremities, to what time in the history of Meyer's case do you refer?

A. I noticed this condition immediately upon my first examination.

Q. Which was at least an hour and a half before he died?

A. Yes, sir.

WILLIAM IRVING THORNTON, M. D.

End of deposition offered and excluded.

41 MARY HYLAND a witness sworn and examined on behalf of the defendant testified as follows:

By Mr. GOODHART:

My business or occupation is that of sick nurse; in the month of September, 1900, my occupation was then sick nurse; in that month I was engaged at the Buffalo General hospital; I remember the 29th day of September 1900; I remember the case of one Emanuel Meyer who was brought to the Buffalo General hospital on that day; the nurse in charge was Miss Robertson; I attended to the Meyer case; I think Dr. McCarthy was the physician in charge of the case; I received orders from Dr. McCarthy regarding the treatment to be given to Meyer; I had a conversation with the man Meyer. I would not want to swear to the conversation. As nearly as I recall the conversation I had with Meyer I asked him what he took and he said a powder; that is all I know; that is the conversation; I positively swear to that.

JOHN R. KENNY, a witness sworn and examined on behalf of the defendant testified as follows:

Direct-examination by Mr. GOODHART:

In September, 1900, I was one of the coroners in and for the county of Erie and State of New York; at that time I was resident at 156 Clinton street, Buffalo; I remember the case of Emanuel Meyer who died in Buffalo on September 29, 1900, from this record.

42 I was the coroner who held the inquest on the body of Emanuel Meyer. I cannot state as a result of my inquest what was the cause of Emanuel Meyer's death.

Q. If the inquest says that the cause of Emanuel Meyer's death was suicide from arsenical poisoning, that the contributing cause of death was myocarditis, and that he was found dying, was that the result of your inquisition?

Objected to as incompetent, irrelevant and immaterial and calling for a conclusion, and also upon the ground that it is not shown that this witness had any knowledge, not having qualified as an expert; the objection was sustained; and the defendant excepted.

Q. Did you see that certificate?

Same objection, ruling and exception.

That is how I came to make that inquisition. I conducted no examination on the body of Emanuel Meyer; no autopsy was performed by my orders; it is not necessary. I say it is not necessary to perform an autopsy because he was taken to the hospital and attended by a regular physician and he gave the cause of death, and that satisfied me; that is all I know about the case.

Cross-examination:

An autopsy had not been performed upon the body. All I know about the history of the case is that certificate of the doctor which I O. K'd, which is on file.

Re-direct examination by Mr. GOODHART:

This certificate I spoke of was a written death certificate;
43 in regular form; I am acquainted with the regular form provided by law; I occupied the position of coroner for thirteen years; I saw the body of Emanual Meyer at Brady's undertaking establishment; I did not know it to be the body of the man. The body was laying in the coffin; I saw the face; that is all I saw; I did not strip the body: I saw that he lay in the coffin, the lid was off; he was completely dressed for burial; he had pants on and a shirt; he was covered from feet to neck; he had his pants, shirt on, etc. By "and so forth" I mean he had clothes on for burial; I saw his hands and his face; that is all I saw.

LAURENCE G. GOODHART, a witness sworn on behalf of the defendant, testified as follows:

I received the proofs of death in this case. I received them from the general counsel of the order accompanied by a letter, which I will offer in evidence, containing certain proofs of death in the case of Emanuel Meyer.

The COURT: I exclude the letter.

The secretary or whoever received it is not here. They are all in Chicago. These papers, however, were sent to me as original papers in connection with the case.

Q. What proofs of death were submitted to the Supreme Lodge of the Knights of Pythias and its board of control in the case of Emanuel Meyer?

The COURT: I exclude it unless it was submitted to you. You have already said they were sent to you by a letter from Chicago.

44 The WITNESS: That is true.

The COURT: I have to exclude it, therefore, you do not know.

Q. What, if you know, is the custom with respect to the furnishing of proofs of death to the Supreme Lodge, Knights of Pythias?

Objected to; objection sustained; and the defendant excepted.

The COURT: There is no custom about it; the contract and the law requires proofs of deaths to be submitted.

To this ruling the defendant excepted.

HENRIETTA MEYER, the plaintiff, sworn and examined as a witness on behalf of the defendant, testified as follows:

By Mr. GOODHART:

I am the plaintiff in this action. I did not send the proofs of my husband's death to the lodge. I presented no proofs of my husband's death to the lodge. I don't know anything about it. I didn't send them; I don't know whether I signed any proofs of death, I think I did. I sent on the blank proofs of death to the lodge. I guess I received one blank when I asked for blank proofs of death; one I think; they did not send it to me; a man gave it to me; Mr. Rothschild gave me the blank one night; I guess he is connected with the Knights of Pythias; I know he was the secretary of my husband's section; I don't remember speaking with Mr. Rothschild about filling up the proofs of death; he gave me a
45 blank; that is all he said and went away; I don't remember, saying anything; he gave me a blank; he called to my house and gave me a blank; he said that was to be filled, I guess, that is all; I don't remember his conversation otherwise; I can't recall anything further that he said; what I did with that blank proof of death, I wrote and filled it up, I guess, I don't know that I wrote it all; I did not give it back to him; when it was all written up; I gave it to somebody. This was sent to the lodge, I guess, I don't know. I don't think I sent it to the lodge.

By Mr. FRIEDMAN:

That is the same paper Mr. Rothschild gave me. I wrote that; that is the paper he gave me; that is what I filled out.

By Mr. GOODHART:

That is the only paper I had. Whether I ever had any conversation with Mr. Rothschild concerning the necessary proofs of death outside of this particular piece of paper, he didn't seem to have nothing to do he didn't tell me nothing; I never spoke to him on the subject of the names of these physicians who took care of my husband in Buffalo; he never spoke to me, he only sent for me and offered me $350.

The by-laws of the organization governing the contract at the time of the admission of Mr. Meyer were received in evidence.

By Mr. GOODHART:

I don't know, I couldn't remember whether this book which my attorney has handed to you was given to him by me.

The defendant proposed to read parts of the physician's
46 proof of death to the jury, as part of the proofs of loss saying that in her proof, she gives the place of the man's death only. To prove the death outside of it, defendant read from the testimony of Dr. Thornton: "Q. I show you a paper partly written and partly

printed. Will you state if you know in whose handwriting the written part of that is written down to the words attending physician? A. Yes, sir. Q. Will you state in whose handwriting that is? A. In mine. Q. Is that your signature above the words 'attending physician'? A. Yes, sir. Q. And did you swear to the contents of this document? A. Yes, sir. Q. As therein appears and before the notary public whose name is thereto subscribed? A. Yes, sir.

The certificate of the physician was offered in evidence. It was excluded and the defendant excepted.

The certificate of the undertaker was received in evidence.

LEOPOLD BERGER, a witness sworn on behalf of the defendant, testified as follows:

By Mr. GOODHART:

I knew the late Emanuel Meyer of the city of New York; I am engaged in the neckwear business; he was occupied with me in business fifteen years; as a salesman; in the year 1900 he traveled for me in different parts of New York State; he took Buffalo; I first heard of Emanuel Meyer's death on Saturday morning; I had a telegram from the hotel; the last communication I had from Emanuel Meyer before that was that I received orders from Buffalo which he took
47 there; I don't know the dates of these orders; the last order was dated two days before September 29th, 1900, the day he died, which I think was Saturday; the orders were dated; he took about eleven orders in one day in Buffalo: I close my place of business on Saturday at five o'clock. I did not receive any communication of Mr. Meyer's death the same day that he died or the next day.

I did not learn that any communication had been sent to me on the day that he died, or the day before he died from him; I have never heard of any such communication; I do not know whether Mr. Meyer just about the time that he died requested any money of me to be sent to him at Buffalo.

The plaintiff rested.

The defendant moved to dismiss the complaint upon the ground that the plaintiff had not shown compliance with the terms of the contract by showing she had put in proper and complete proofs of death, as provided by the by-laws and the contract.

The COURT: At the opening of the case you claimed the affirmative and admitted that all the conditions precedent had been complied with, therefore, the plaintiff did not need to put in any such proof.

The motion was denied; to which the defendant excepted.

Both sides having summed up, the court charged the jury as follows:

GENTLEMEN: I just submit to you the one question, whether this deceased committed suicide. The burden is on the defendant to establish that. They have pleaded as a defense that he committed suicide. They have to prove it. Counsel says the
48 proof of it is what this nurse says in this deposition the deceased said to her "I took a powder." He says that she said, "And it produced the symptoms which I now have." I did not hear that part read, and I do not think it was read.

DEFENDANT'S COUNSEL: I apologize to the court for that, I made a mistake.

The COURT: Well, the best way is to get just what facts are in the case and try it that way. You are to decide from what evidence there is in here, whether the defendant has established that the deceased committed suicide. You will answer the question: Did the deceased commit suicide either yes or no. That must be established by a fair preponderance of evidence. I have excluded the evidence of the physicians and surgeons who attended him, because the law excludes it. When you employ a doctor he may not come into court and disclose what he learns in the treatment. It is not permitted. Neither may a lawyer or a priest disclose what they learn. That is well established in our law. So you must confine yourselves not to any suggestion or imagination, but to the proof that is here, whether he committed suicide.

Just answer that question.

DEFENDANT'S COUNSEL: I except to so much of your honor's charge as states that the physicians' and surgeons' testimony is excluded on the ground that they attended the deceased professionally.

The COURT: Yes.

49 *Certificate of Membership.*

No. 48028. Amount, $2,000.

Endowment Rank of the order of Knights of Pythias.

This certificate witnesseth, that Emanuel Meyer is a member of section No. 2179 of the Endowment Rank Knights of Pythias of the World, said membership being based upon evidence received that he is a member in good standing of a subordinate lodge of the order of Knights of Pythias, and upon the declarations, representations and agreements made in his application bearing date of September 6, 1894, and the statements certified by him therein to the medical examiner, which application is filed in the office of the board of control of the Endowment Rank and made a part of this contract.

In consideration of the payment by said member of the prescribed membership fee and of the payment hereafter to said Endowment Rank of all monthly payments, assessments and dues as required, and the full compliance with all the conditions herein contained and with the laws governing this rank, now in force or that may

hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or the board of control of said rank, and shall be in good standing under said laws, the board of control of the Endowment Rank, Knights of Pythias of the World, will pay to Hattie Meyer, his wife, the sum of two thousand dollars out of the endowment fund of the rank in accordance with, and under the laws governing the payment of benefits, upon due notice and satisfactory proof of death, and good standing in the rank at time of death, and a full receipt and surrender of this certificate, subject, however, to the conditions, restrictions and limitations subscribed to by said
50 member in his application and to the further conditions and agreements hereinafter named; and provided, also, that this certificate shall not have been surrendered by said member or cancelled at his request and another certificate issued in accordance with the laws of the rank.

Provided, further, that the beneficiary herein designated shall acquire no interest whatever in the certificate, nor in the endowment fund, until the benefit shall have lawfully accrued by reason of the death of said member and no subsequent change in the beneficiary shall have been made. In case of the death of said beneficiary during the lifetime of the member, the benefit accruing under this certificate shall be payable as provided for in article VI, section I of the General Laws of the Endowment Rank. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws now or hereafter in force governing this rank, shall render this certificate and all claims thereunder null and void, and the said Endowment Rank shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge, Knights of Pythias of the World, at Chicago, Illinois, this 20th day of September, 1894.

[CUT.] J. A. HINSEY,
President Board of Control.

Attest: H. B. STOLTE,
Secretary Board of Control.

51 I hereby accept this certificate of membership subject to all the conditions therein contained.

Signature of member: EMANUEL MEYER.

[SEAL.] Dated at New York, this 28th day of September, 1894.

Attest: LOUIS RIEGEL,
Sec'y Section No. 2179, *Endowment Rank, K. of P.*

Application for Membership in the Endowment Rank, Knights of Pythias of the World.

To the board of control, Endowment Rank, Knights of Pythias:

The undersigned, makes the following application for membership in section No. 2179 of the Endowment Rank Knights of Pythias.

I hereby warrant that I am a member of Independence Lodge No. 361, Knights of Pythias of the grand jurisdiction of State of N. Y.; that dues and other charges against me in said lodge are paid to Oct. 1st, 1894, and that all questions herein are truthfully and completely answered.

1. A. Give your name in full. A. Emanuel Meyer.

B. Post-office address. B. 1695 Lexington Av.

C. Present and previous occupation. State clearly the kind of business. C. Present, salesman; previous, salesman neckwear.

D. Are you married, single or widower? D. Married.

52 2. Give the place and date of your birth and present age at nearest birthday. Born at N. Y. city, State of N. Y., on the 25th day of April, 1862. Age nearest birthday 32.

4. A. Have you ever been a member of the Endowment Rank? If so, give section number, and cause of the termination of your membership. A. No.

B. Have you now any life insurance or endowment? B. No.

C. If so, in what order or company? Give the names and amount in each. C.

D. Have you ever applied to any society, company or agent for insurance without receiving a certificate or policy? If so, state full particulars. D. No.

5. What amount of endowment do you desire, $1,000, $2,000, $3,000, $4,000 or $5,000? $2,000.

6. A. To whom do you want the endowment paid? Give name or names in full and post-office address. A. Hattie Meyer, 1695 Lexington Av.

B. State the relationship of the person or persons to you. B. Wife.

Persons related — or dependent upon the applicant for support can be named only. See article VI, sec. 1, General Laws.)

Read carefully the following declaration and agreement, and observe its import:

I hereby declare that I am a member in good standing of the order of Knights of Pythias, that I am not now a member of the Endowment Rank Knights of Pythias, have never been rejected as an applicant thereof, and that I am in sound, mental, and physical condition; and it is further declared that the foregoing answers and statements, whether written in my own hand or not, to-

53 gether with the answers and statements made, or to be made, to the medical examiner in the continuance of this applica-

tion are warranted to be full, complete and true, and shall, together with all the agreements hereinafter made, form the basis of any certificate of membership issued hereon. It is agreed by myself and binding upon all parties who may hereafter become interested, that if any statement in this application, or to the medical examiner or in any certificate of health that may be hereafter given, or in the proofs of loss or death, by which any certificate of membership issued hereon matures, is untrue, or if there shall be any failure or neglect to pay any assessments, monthly payments or dues as prescribed by the laws of the rank or order, or severing in any manner whatever my membership or connection with the order or the Endowmennt Rank, said certificate shall be null and void, and all right, title and interest in and to the same, as well as the rights of my heirs and beneficiaries to the benefits and privileges accruing to members in good standing of this rank shall be forfeited; and I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material. The person soliciting or taking this application and also the medical examiner, shall be held to be the agents of the applicant as to all answers and statements in this application.

54 It is agreed that if death shall result by self-destruction, whether sane or insane, voluntary or involuntary, or if death is caused or superinduced by the use of intoxicating liquors, or by the use of narcotics or opiates, or in consequence of a duel, or by the hands of justice, or in violation of, or attempt to violate any criminal law, then the certificate issued upon this application shall be null and void, and all claims on account of such membership shall be forfeited.

It is agreed that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership, in the Endowment Rank Knights of Pythias, or on any certificate issued, upon this application, unless good and sufficient proof of death is furnished the board of control of the Endowment Rank within one year from date of death of the member, nor shall such action at law be maintained unless suit is commenced within two years from the date of the death of the member.

It is agreed that membership shall not begin, and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board.

In addition to the above provisions, I hereby agree that I will be governed, and this contract shall be controlled by all the laws, rules

and regulations of the Supreme Lodge Knights of Pythias of the World, and of the board of control, of the Endowment Rank governing said rank, now in force or that may hereafter from time to time be enacted by said Supreme Lodge or board of control, or submit to the penalties therein contained.

55 To all of which I willingly and freely subscribe.
Dated at New York, this, the 6th day of Sept., 1894.

EMANUEL MEYER, *Applicant.*

Witness:
LOUIS RIEGEL,
[SEAL.] *Sec'y Sec. No.* 2179.

Applicant must sign in person and with first name in full.

NOTE.—Every blank on this application must be properly filled and all questions on the medical examiner's form and in the examination, must be answered before sending the application to the board of control.

Physician's Proof of Death.

The physician making certificate of death will please observe the following abstract of the contract under which deceased held membership.

"I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

Endowment Rank, Knights of Pythias. Physician's certificate of death. All answers must be full and explicit and in the physician's own handwriting.

56 STATE OF NEW YORK, } ss:
County of Erie, }

Wm. I. Thornton, M. D., of Buffalo, N. Y., residing at 100 High street, being duly sworn, deposes and says that he is a physician by profession, of 1½ years' practice, graduated from Buffalo Medical College, of Buffalo, N. Y., that, as such physician he attended in the last illness of Emanuel Meyer (hereinafter called deceased) who died at Buffalo General Hospital on the 29th day of September, 1900, that the answers herein given contain true and full information concerning the subject matter of all questions asked:

To prevent delay in the consideration of this death-proof, please do not use such indefinite terms as "heart-failure," "general debility," "dropsy," "old age," etc.

1. Have you read the conditions of the contract printed above? Yes.

2. A. What was apparent age of deceased? A 36 years.
B How long have you known him? B About two hours.
C How long medical attendant or adviser? C About 2 hours.

3. What was occupation of deceased during time you knew him and up to date of death? Travelling salesman.

4. Was deceased engaged in any way in the sale or manufacture of alcoholic liquors? Not known.

5. A What was disease during last illness? A A condition simulating arsenic poisoning.
B How long in your opinion, did deceased suffer from this disease? B About 10 hours.
57 C What was the *immediate* cause of death? C From a condition simulating arsenic poisoning.

6. For how long a time was deceased confined to the house or prevented from attending business? Ten hours.

7. A When were you first consulted by the deceased, or by any relative or friend for the affection which either directly or indirectly caused death? A Sept. 29th, 1900.
B Give dates of your first and last visit? B Same as above.

8. Was there any special cause, direct or indirect, for the death, in the habits, occupation or residence of deceased? Not known.

9. A Did deceased use narcotics or alcoholic beverages of any kind? A Not known.
B If so, to what extent? B.
C Did such usage, in your opinion, hasten or cause death, directly or indirectly? C.

10. Was death caused by suicide or violence, or from other than natural causes? If so, state particulars. Suicide. Patient said he was in trouble and took a white powder which preceded the above condition which led to his death.

11. Was there a post-mortem examination of deceased; if so, by whom and with what result?

12. Did any other physician attend deceased, either before or during last illness? If so, give the name and address of each? No.

13. For what disease did you treat or advise deceased prior to his last illness? Give dates, duration and result of each. None.

58 14. Had deceased any other disease, acute or chronic, or any injury or infirmity; if so, state whether it hastened death? Not known.

15. Have any of deceased's relatives been afflicted with or died of insanity, tuberculosis, consumption, or any hereditary disease? State fully. Not known.

16. Have you known or heard of deceased applying for insurance

to any company or association upon which a policy or certificate was not issued? If so, when and what company or association? No.

WM. I. THORNTON,
Attending Physician.

Subscribed and sworn to before me this 8th day of January, 1901.

[L. S.] RANWICK R. ROSS,
Notary Public, Erie Co., N. Y.

STATE OF NEW YORK, }
County of Erie, } ss:

I, Carl J. Seymour, dep. clerk of the county court, being a court of record of said county, do hereby certify that Renwick R. [SEAL.] Ross before whom the above affidavit was made, was, at *at* the time of the same, a notary public in and for said county, duly authorized to administer oaths, and I verily believe his signature to be genuine.

Witness my hand and official seal this 9th day of January, 1901.

CARL J. SEYMOUR, *Dep. Clerk.*

59 *Certificate of Undertaker.*

Edward L. Brady, an undertaker, residing at Buffalo, N. Y., being duly sworn, deposes and says that the following answers by him made and subscribed to, are true and full to the best of his knowledge and belief.

1. Name and apparent age of deceased? Emanuel Meyer, about 36 years.

2. Residence and occupation of deceased? New York city. Salesman.

3. Date and place of death? Sept. 29th, 1900; 100 High street, Buffalo.

4. Did you attend the funeral and interment of deceased; when and where? I sent the body to New York city for burial.

5. Do you know the body interred to be that of the person named by you as the deceased? Never knew him during his life, but believe it was Emanuel Meyer.

EDWARD L. BRADY.

Subscribed and sworn to before me this 9th day of January, 1901.

[L. S.] JOHN F. SPACK,
Notary Public.

Certificate of notaryship by clerk of same county court as above.
Endowment Rank, Knights of Pythias.
Certificate and claim of beneficiaries.
All answers must be full and explicit.

60 When beneficiaries are minors, or non-residents of the United States or Canada, this certificate and claim must be executed by their legal representative, either guardian or attorney, and certificate from proper officer, showing their appointment as such, must invariably be furnished.

STATE OF NEW YORK, }
County of New York, } ss:

The undersigned, beneficiary of certificate number 48028, for $2000, issued by the Endowment Rank, Knights of Pythias to the late Emanuel Meyer, a member of section No. 783 of said Endowment Rank, being duly sworn says that she is the *bona fide* beneficiary of the endowment accruing under said certificate, and declares that the answers given to the following questions are correct:

1. State the name in full, age, relationship, and residence of each beneficiary? Hattie Meyer, 35, wife.

2. Name of deceased in full? Emanuel Meyer.

3. Residence of deceased since above certificate was issued? 53 W. 112th St.

In stating occupation, merchant, clerk and similar terms must not be used.

4. A. Occupation of deceased at date of certificate? A. Traveling salesman.

B. Occupation of deceased March 1, 1894? B. Traveling salesman.

C. Occupation of deceased from March 1, 1894, to date of death? C. Traveling salesman.

D. Occupation of deceased since certificate was issued? D. Traveling salesman.

61 5. Place and date of birth of deceased? New York city. Apr. 25, 1862.

6. Place and date of death? Buffalo, N. Y., Sept. 29, 1900.

7. A. What was the disease during last illness? A. Heart trouble, I suppose, as that was the only trouble he had.

B. What was the immediate cause of death? B. Don't know.

8. When did health of deceased first begin to be affected? 1 year and 3 weeks prior to death.

9. Duration of last illness? Give full particulars in relation thereto. Over one year.

10. Had the deceased any previous disease, and if so when and what was the nature and duration of same? No.

11. Give the date, as near as possible, when health of deceased first became impaired? Over one year.

12. Name and residence of every physician who attended or prescribed for deceased within three years prior to the date of death? Dr. Levinsky, 116th St.

13. Was an inquest held? If so, furnish herewith copies of the evidence and finding. No.

14. Was death caused by suicide or violence, or from other than natural causes? Don't know.

15. Was deceased engaged in any way in the sale or manufacture of alcoholic liquors? No.

16. Had deceased any other insurance on his life? If so, state what companies or societies, and the amount, and date when each was obtained. No.

17. Have any of deceased's relatives been afflicted with or
62 died of insanity, tuberculosis, consumption, or any hereditary disease? State fully. No.

18. Have you known or heard of deceased applying for insurance to any company or association upon which a policy or certificate was not issued? If so, when and what company or association. No.

Signature of beneficiaries: HATTIE MEYER.

Subscribed and sworn to before me this 1st day of December, 1900.

[SEAL.] B. J. BIRNBAUM,
Commissioner of Deeds (*No.* 96), *New York City.*

STATE OF NEW YORK, }
City of New York, } ss:

I, P. J. Scully, city clerk of the city of New York, do hereby certify that B. J. Birnbaum, before whom the annexed deposition was taken, was, at the time of taking the same, a commissioner of deeds for the city of New York, dwelling in said city, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said commissioner, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said city, the 10th day of December, 1900.

[SEAL.] P. J. SCULLY, *Clerk.*

10c. documentary stamp.
"County clerk's certificate."

63 *Certificate of Master of Finance.*

STATE OF NEW YORK, }
County of New York, } ss:

Benjamin Hart, being duly sworn, says that he is the master of finance of Shakespeare Lodge No. 274, located at —— grand domain of —— and that Bro. Emanuel Meyer of said lodge who died on 29th Sept., 1900, was at the time of his death a member in good standing, and that his dues were paid to December, 1900.

[L. S.] BENJAMIN HART,
Master of Finance.

Subscribed and sworn to before me this 28th day of November, 1900.

HERMAN FRANKFORT,
Notary Public, N. Y. Co.

County clerk's certificate.

Certificate of President and Secretary of Section.

This is to certify that Emanuel Meyer, who died on Sept. 29th, 1900, was at the time of his death a member in good standing of section No. 783, Endowment Rank, Knights of Pythias; that he held certificate No. 48,028, for $2,000, and that the beneficiary named therein is the same person who subscribed to the "certificate and claim of beneficiaries" on the reverse hereof.

Witness our hands and the seal of the section at New York, State of New York, this 3rd day of December, 1900.

L. H. ROTHSCHILD, *Act. President.*
JOSEPH ROTHSCHILD, *Secretary.*

64 The by-laws in force at the time of the admission of Emanuel Meyer to membership in the Endowment Rank of the defendant as far as material to the issues in this case are as follows:

ARTICLE XII.

Proof of Death.

SECTION 1. The proof of death shall in all cases be furnished by the beneficiary or beneficiaries on blank forms to be obtained of the board of control, and shall contain affidavits of the attending physician or physicians, the undertaker who officiated, the master of finance as to standing of deceased in the subordinate lodge at time of death, and from such other person or persons as may be required; affidavits to be made before an officer authorized to take affidavits, and such authority must be certified by the clerk of a court of record, or other competent authority, under seal.

SEC. 2. All necessary legal papers required in order to secure the proper payment of benefits must also be furnished by the beneficiary or beneficiaries, and shall be forwarded with the proof of death to the board of control by the secretary of the section.

65 & 66 It is hereby stipulated and agreed that certification of the case on appeal in above entitled action, in accordance with the provisions of section 3301 of the Code of Civil Procedure is hereby waived.

Dated New York, February 14th, 1903.

LAURENCE G. GOODHART,
Attorney for Appellant.
J. LAWRENCE FRIEDMANN,
Attorney for Respondent.

The foregoing case is hereby ordered on file.
New York, February —, 1903.

WILLIAM J. GAYNOR, *J. S. C.*

67 Supreme Court, Appellate Division, Second Judicial Department.

Present: Goodrich, P. J.; Bartlett, Woodward, Hirschberg and Hooker, JJ.

(Same title.)

Appeal from a judgment entered upon the verdict of a jury in favor of the plaintiffs at Queens trial term and from an order denying the defendant's motion for a new trial.

Laurence G. Goodhart for the appellant.
Otto H. Droege (J. Lawrence Friedmann with him on the brief), for the respondent.

GOODRICH, *P. J.:*

The plaintiff being the beneficiary named in a membership certificate issued upon the application of her husband, Emanuel Meyer, by the defendant, a fraternal mutual benefit corporation, sues for the amount of insurance on the life of her husband specified in the certificate. The defence was that Meyer had committed suicide, which by the terms of the certificate renders it null and void.

When the case came on for trial before Mr. Justice Gaynor and a jury, the defendant claimed and obtained the affirmative of the issue and introduced its evidence, and the plaintiff introduced evidence in rebuttal. At the close of the whole evidence, the defendant moved for a dismissal of the complaint, "upon the ground that the plaintiff had not shown compliance with the terms of the con-
68 tract by showing that she had put in proper and complete proofs of death, as provided by the by-laws and the contract." The court properly denied the motion on the ground that the defendant, at the opening of the case, had "claimed the affirmative and admitted that all the conditions precedent had been complied with, therefore the plaintiff did not need to put in any such proof." The court submitted to the jury for special verdict the question: Did Emanuel Meyer, the husband of the plaintiff, commit suicide? And the jury having answered the question, No, the court directed judgment for the amount of the policy, and the jury found a verdict accordingly. The defendant moved to set aside the verdict; the motion was denied and the defendant excepted and appeals.

The only question which we are required to consider is the exception to a refusal to admit the testimony of three physicians, who attended Meyer, as to declarations concerning the cause of his death made by him in their presence. The plaintiff's counsel objected to

their admission on the ground that such testimony was incompetent and improper and also privileged, that any knowledge obtained by the witnesses was obtained by them while they were acting as physicians for the deceased and was not admissible unless expressly waived at the trial. Plaintiff's counsel stated that the plaintiff did not waive any of the privileges given by sections 834 and 836 of the Code of Civil Procedure. The court excluded the testimony and the defendant excepted. It also excepted to so much of the charge as stated that the physicians' testimony is excluded on the ground that they attended the deceased professionally.

Dr. Bruso, one of these physicians, was summoned to the Iroquois hotel, Buffalo, about seven o'clock in the morning to attend Meyer, who was lying in bed in one of the rooms of the hotel.

69 When the defendant's counsel offered to read certain portions of the deposition of Dr. Bruso, taken *de bene*, which disclosed information as to the condition of the patient, plaintiff's counsel objected and the court asked "Did this doctor treat him?" to which defendant's counsel answered, "He inserted something hypodermically into the man against his wish, which did not help him, I presume." Thereupon the court excluded the evidence and also the other parts of the deposition, and defendant's counsel excepted. The excluded part of the deposition would have tended to show that Meyer had voluntarily taken a corrosive poison known as "Rough on rats," with suicidal intent Meyer was afterward taken from the hotel to the Buffalo General hospital, where he died. Upon arrival at the hospital he was, by order of Dr. McCarthy, house physician of the hospital, put into a private room where the doctor examined and treated him. Dr. McCarthy, who was examined on deposition *de bene*, was asked to state his diagnosis of the case and the details of Meyer's condition, and, objection being made, the testimony was excluded and the defendant excepted.

Dr. Thornton, junior surgeon of the hospital, assisted Dr. McCarthy in the examination and treatment of Meyer. He also was examined on deposition as to his examination of Meyer and the condition in which they found him. The entire deposition was excluded and the defendant excepted.

These several exceptions distinctly raise the question whether sections 834 and 836 relate to cases where physicians professionally attend a patient who does not voluntarily require their serv-

70 ices. There is no evidence that Meyer employed any one of these physicians, but it is none the less true that they attended him in no other than a professional capacity. Section 834 forbids any physician "to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The language is broad enough to cover cases of medical attendance, whether such attendance results from the voluntary call of the patient upon a physician or from the exigencies of the patient's situation. If the relation is that of a physician attending a patient in a professional

capacity, no matter how the relation was brought about, the sections apply.

Section 836 provides that section 834 applies to any examination of the physician "unless the provisions thereof are expressly waived upon the trial or examination * * * by the patient. * * * But a physician * * * may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient." The record shows that the plaintiff did not waive the privilege either on the trial or examination of any of the physicians; and even where the personal representatives waive the privilege, the physician is forbidden to disclose any fact which would tend to disgrace the memory of the patient. It can hardly be said that a declaration of Meyer that he had attempted suicide would not tend to disgrace his memory.

71 The defendant contends that the plaintiff at the trial waived the physician's privilege by offering in evidence Meyer's application for insurance, which contained a waiver of the provisions of sections 834 and 836, but the court of appeals has held the contrary in Holden *v.* Metropolitan Life Ins. Co. (165 N. Y., 13), and thus set at rest a question which has been much litigated.

There was no error in the exclusion of the testimony in question, and the judgment and order should be affirmed.

At a term of the appellate division of the supreme court held in and for the second judicial department at the borough of Brooklyn, on the 24th day of April, 1903.

Order of Affirmance on Appeal from Judgment.

Present: Hon. William W. Goodrich, presiding justice.
" " William Bartlett,
" " John Woodward,
" " Michael H. Hirschberg,
" " Warren B. Hooker, justices.

(Same title.)

The above named The Supreme Lodge, Knights of Pythias, the defendant in this action having appealed to the appellate division of the supreme court from a judgment of the supreme court entered in the office of the clerk of the county of Queens on the 28th day of October, 1902, and from an order made by said court denying a motion for a new trial therein, and the said appeal

72 having been submitted by Mr. Lawrence G. Goodhart of counsel for the appellant and by Mr. Otto H. Droege of

counsel for the respondent, due deliberation having been had thereon, and the court having unanimously, decided that the verdict of the jury is supported by the evidence.

It is hereby ordered, and adjudged that the judgment and order so appealed from be, and the same are hereby affirmed; and that the respondent recover of the appellant the costs of this appeal.

Enter,

WM. W. GOODRICH, *P. J.*

Judgment.

Supreme Court of the State of New York, Queens County.

(Same title.)

The above named defendant, The Supreme Lodge, Knights of Pythias, having appealed to the appellate division of the supreme court, for the second judicial department, from the judgment entered in the office of the supreme court of the county of Queens, on the 28th day of October, 1902, for the sum of two thousand four hundred forty-two and 03/100 ($2442.03) dollars in favor of Henrietta Meyer, the above-named plaintiff, and from the order denying the motion of the defendant for a new trial, entered in the office of the clerk of the supreme court on the 23d day of October, 1902, and

73 the said appeal having been duly submitted upon the case and exceptions, and the said appellate court having, after due consideration, ordered that the said judgment and order be affirmed, with costs to the respondent, and the costs of the said respondent having been duly adjusted on notice at the sum of one hundred one and 50/100 ($101.50) dollars,

It is, on motion of J. Lawrence Friedmann, attorney for the plaintiff,

Ordered and adjudged that the said judgment and order appealed from be and the same are hereby affirmed, with costs, and that the plaintiff, Henrietta Meyer, recover of the defendant, The Supreme Lodge, Knights of Pythias, the sum of one hundred one and 50/100 ($101.50) dollars, costs and disbursements on appeal, and have execution for the same.

Dated Jamaica, Queens county, 30th day of April, 1903.

JAMES INGRAM, *Clerk.*

Notice of Appeal to the Court of Appeals.

Supreme Court of the State of New York, County of Queens.

(Same title.)

SIRS: Please take notice that the defendant, The Supreme Lodge, Knights of Pythias, hereby appeals to the court of appeals from the order of the appellate division of the supreme court of the State of

New York for the second judicial department made in this
74 action on the 24th day of April, 1903, and entered in the office of the clerk of said court on said day, whereby it was ordered and adjudged that the judgment heretofore and on the 28th day of October, 1902, made and entered in the office of the clerk of the supreme court of the State of New York, county of Queens, and which adjudged that the plaintiff recover from the defendant the sum of $2442.03 damages and costs, and the order made in this action on the 23d day of October, 1902, and entered in the office of the clerk of this court denying the motion of the defendant for a new trial be affirmed, and from the judgment entered in the office of the clerk of this court on the 30th day of April, 1903, affirming said judgment and said order denying the motion of the defendant for a new trial and adjudging that the plaintiff do recover of the defendant the sum of $101.50 costs and from each and every part of said order and said judgment so appealed from.

Dated May 8th, 1903.

Yours, &c.,

LAURENCE G. GOODHART,
Attorney for Defendant-Appellant.

Office and P. O. address, No. 17 Park row, borough of Manhattan, New York city, N. Y.

To J. Lawrence Friedmann, Esq., attorney for plaintiff-respondent, No. 63 Park row, New York city, borough of Manhattan.

To James Ingram, Esq., clerk of the county of Queens.

75 It is hereby stipulated by and between the attorneys for the respective parties hereto that certification of the case on appeal to the court of appeals herein, in accordance with the provisions of § 3301 of the Code of Civil Procedure is hereby waived and that the foregoing contains the entire record herein.

Dated New York, May 13th, 1903.

J. LAWRENCE FRIEDMANN,
Attorney for the Appellant.
LAURENCE G. GOODHART,
Attorney for the Respondent.

The foregoing case is hereby settled and ordered on file.
May 22d, 1903.

J. S. C.

76 STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 15th day of March, in the year of our Lord one thousand nine hundred and four, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, March 16th, 1904.

HENRIETTA MEYER, Respondent,
ag'st
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Appellant.

Be it remembered, that on the 29th day of May, in the year of our Lord one thousand nine hundred and three, The Supreme Lodge, Knights of Pythias, the appellant in this action came here into the court of appeals, by Laurence G. Goodhart, its attorney, and filed in the said court a notice of appeal and return thereto from the order and judgment of the appellate division of the supreme court in and for the second judical department. And Henrietta Meyer, the respondent in said action, afterwards appeared in said court of appeals by J. Lawrence Friedman, her attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed

Whereupon, the said court of appeals having heard this cause argued by Mr. Laurence G. Goodhart of counsel for the appellant and by Mr. Otto Groege of counsel for the respondent, and after due deliberation had thereon, did order and adjud-e that the judgment
of the appellate division of the supreme court appealed from
77 herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid—

And hereupon as well the notice of appeal and return thereto aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *March 16th*, 1904.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[Seal of Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

78 VANN, *J.:*

The deceased was in extremis, incapable of acting or deciding for himself, and from the necessity of the case any one was authorized to call a physician to treat him. Without the knowledge or consent of the dying man Dr. Bruso was called for that purpose and for that purpose alone he attended. He found Mr. Meyer, the deceased, in bed in an upper room of a hotel "suffering intense pain and vomiting." Meyer told him to get out of the room, that he did not want him there, but he did not leave. He remained to treat him as a physician, and in order to treat him intelligently tried to find out what the matter was. He learned from Meyer, partly in answer to questions and partly through voluntary disclosures, that he had taken a preparation of arsenic, known as Rough on rats, "because he wanted to die." From this information, and from observation of the physical symptoms, he decided that Meyer was suffering from arsenical poisoning. Thus informed as to the nature of the disease, he at once administered a remedy and soon followed it by another. The helpless man, without friends to aid or advise, hopeless of life and courting death, objected and tried to curse him away from his bedside. The doctor, loyal to the instincts of his profession, refused to listen to the ravings of the would-be suicide and continued to prescribe in order to relieve suffering and prolong life. Upon the trial he was not allowed to disclose the information acquired under these circumstances, and we are now to determine whether there was enough evidence to warrant the trial judge in deciding, as a preliminary question of fact, that such information was acquired "in attending a patient in a professional capacity," and that it "was necessary to enable him to act in that capacity." (Code Civ. Pro. § 834; Griffiths *v.* Met. St. Ry. Co., 171 N. Y. 106, 111.)

79 The learned doctor was called as a physician; he attended as a physician; he made a diagnosis as a physician and he administered remedies as a physician. In all that he did he acted in a professional capacity. While it is true that in all he did he acted against the will and in spite of the remonstrance of a man whose condition imperatively called for professional treatment, still the meeting was professional in nature, and all that he said or did was strictly in the line of his profession. Was the subject any the less "a patient" within the meaning and object of the statute, be-

cause he was forced to submit to ministrations designed to save his life? Was the doctor guilty of assault when he gave the hypodermic injection? Was he bound to leave him there to die without an effort to help him? Was the statute designed to protect those only who are treated by consent, but not those treated through necessity? Does it not mean by "a patient" at least one who is consciously treated by a physician even without his consent, when the facts tend to show that through bodily suffering his mind had partially lost its hold? Do our humane laws make it the duty of a physician to leave the bedside of a dying man, because he demands it, and if he remains and relieves him by his physical touch, hold him guilty of assault? Either Dr. Bruso was the physician of Mr. Meyer or he committed an assault upon him and was guilty of a crime. If the wife of the deceased had called the doctor she would have acted as an agent by implied authority; the bell boy who in fact called him also acted upon implied authority, and when the doctor came the act of the agent in calling him, if subject to revocation in the actual case, would have been in the supposed case. While the doctor in either case could have retired, if he remained in either he remained as a physician, the sick man became his patient and he was acting in a professional capacity when, as a duly licensed physician, he actually treated Meyer as a patient—when one who is sick unto death is in fact treated by a physician as a patient even against his will, he becomes the patient of that physician by operation of law. The same is true of one who is unconscious and unable to speak for himself. If the deceased had been in a comatose state when the physician arrived, the existence of the professional relation could not be questioned. The relation of physician and patient, so far as the statute under consideration is concerned, springs from the fact of professional treatment, independent of the causes which led to such treatment. An examination made in order to prescribe establishes the same relation. I am of opinion that Dr. Bruso, who treated the deceased at the hotel, occupied the same confidential relation to him as did the physicians at the hospital. The fact that the patient told the doctor several times to let him alone as he wished to die, expressing himself in a brutal and profane manner, does not, in my judgment, negative the existence of the relation of physician and patient. As was said by Judge Earl in Renihan *v.* Dennin (103 N. Y. 573, 578): "Dr. Bontecou was a person duly authorized to practice physic. Whatever information he had about the condition of the testator he acquired while attending him as a patient. It is true that the testator did not call him or procure his attendance, but he did not t-rust himself into his presence or intrude there. He was called by the attending physician and went in his professional capacity to see the patient, and that was enough to bring the case within the statute. It is quite common for physicians to be summoned by the friends of the patient or even by strangers about him, and the statute would be robbed of much of its virtue if a physician thus called were to be

excluded from its provisions because * * * he was not employed by the patient nor a contract relation created between him and the patient. To bring the case within the statute it is sufficient that the person attended as a physician upon the patient and obtained his information in that capacity." So in People *v.* Murphy (101 N. Y. 126) it was held that the fact that the physician was selected and sent by the district attorney to attend the patient, after the commission of a crime against her person, did not affect
81 the question.

When a physician is sent by a prosecuting officer to make a report upon the sanity of a prisoner, if he does not treat or prescribe for the subject, the statements of the latter are not protected. (People *v.* Sliney, 137 N. Y. 570); but even though a physician is sent for the sole purpose of examining as to sanity, if he prescribes for the prisoner during the visit, the relation of physician and patient is thereby created and the disclosures made are within the statute. (People *v.* Stout, 3 Parker's Cr. R. 670; Weitz *v.* Mound City Ry. Co., 53 Mo. App. 39; Freel *v.* Market St. Ry. Co., 97 Cal. 40; Colorado Fuel & Iron Co. *v.* Cummings, 8 Colo. App. 541. See, also, Grossman *v.* Supreme Lodge, 6 N. Y. Supp. 821; Grattan *v.* Metro. Life Ins. Co., 24 Hun., 43; Edington *v.* Mutual Life Ins. Co., 67 N. Y. 185.) The fact of treatment is the decisive test in this case. Meyer was treated by the witness as a physician and answered his questions knowing that he was a physician and that he was about to prescribe for him against his will. As was well said by the learned judges of the appellate division: "The language (of the statute) is broad enough to cover cases of medical attendance, whether such attendance results from the voluntary call of the patient upon the physician or from the exigencies of the patient's situation. If the relation is that of a physician attending a patient in a professional capacity, no matter how the relation was brought about, the sections apply."

In Griffiths *v.* Met. St. Ry. Co. (171 N. Y. 106), relied upon by the appellant, there was no evidence that the physician acted in a professional capacity, or even that the supposed patient knew he was a physician. The doctor in that case testified that at the time he acquired the information he did not "treat him in any sense as a physician;" that his conversation with him did not relate to his physical condition but was confined "to the method of the
82 accident and that whatever he said was entirely distinct from any treatment or visit of a physician, or anything of that sort;" that while he had rendered "first aid" to the plaintiff in a drug store immediately after the accident when no statement was made, "he did not think the plaintiff knew he was the physician who treated him at the drug store and that he did not advise him of the fact until after the plaintiff had given him a statement." Judge Werner, writing for this court, said: "Here there are no facts shown which would warrant the presumption that the relation of physician and patient existed, or that would justify the conclusion

that the conversation the doctor was about to give had any relation to professional treatment."

I think that the statute impresses absolute secrecy upon all knowledge acquired by a physician in a sickroom that is necessary to enable him to properly treat the sick person, whether the treatment be with or without his consent. While I agree with Judge Gray in his conclusion as to the first question considered by him, I differ as to the last and for the reasons stated vote in favor of affirmance, with costs.

GRAY, J. (dissenting):

The action was brought to recover against the defendant, a fraternal, mutual benefit corporation organized under the acts of Congress of the United States, upon a certificate of membership issued to Emanuel Meyer, by which it promised to pay, upon his death, to his wife, this plaintiff, the sum of $2,000. The defendant alleged, in defense of the action, that the death of Meyer was the result of suicide; which, within the terms of the agreement of the parties, avoided the certificate. Upon the trial of the issues, the defendant, claiming the affirmative and not questioning plaintiff's preliminary proofs to establish a case under the allegations of her complaint, was allowed to begin with its defense and its evidence was directed towards proving that the beneficiary committed suicide by
83 taking poison. The trial judge submitted to the jury the one question, "whether the deceased committed suicide," and upon their answering "No" to the question, he directed judgment to be entered for the plaintiff. That judgment has been affirmed by the appellate division and, upon this appeal, in substance, the general argument of the appellant is that the waiver of the deceased, contained in his application for the insurance certificate, of all provisions of law, then, or thereafter, in force, prohibiting any physician from testifying to any information acquired by attendance upon him, was a part of a contract, which had been validly made in the State of Illinois, and that sections 834 and 836 of the Code of Civil Proceedure of this State, under which such testimony is rendered inadmissible, unless the statutory prohibition is waived upon the trial by the personal representatives of the deceased, are inoperative, as being in violation of the provisions of the Federal Constitution, which prohibits legislation in impairment of contracts. The argument, further, is that as to one of the physicians, called upon to testify for the defense, his testimony, certainly, did not come within the statutory prohibition; inasmuch as the necessary relationship of physician and patient did not exist.

With respect to the first of these questions raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made

his application for the insurance. The certificate, issuing upon the application, appears, from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: "I hereby accept this certificate of membership sub-
84 ject to all the conditions therein contained," and that had the signature of the applicant, followed by the words, "Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P." By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but "to the further conditions and agreements hereinafter named," and the clause containing his acceptance, above quoted, was one of those "further agreements." From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate: namely, to accept it "subject to all the conditions therein contained." The contract was not completed, in the sense that it was binding upon either party to it, until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As a matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him.

The difficulty in this case, which, in my judgment, entitles the defendant to a new trial in the action, is the exclusion of the evidence of Dr. Bruso, called as a witness for the defendant and asked to state a conversation had with Meyer, the deceased. This witness was a physician, having his office in the city of Buffalo, in this State, near to the Iroquois hotel. He testified that, in the early morning, one of the bell boys of the hotel came for him and, upon entering one of the rooms, he found a man in the bed, suffering from pain and vomiting. Objection being made to his evi-
85 dence, which was in the form of a deposition, the court put the question: "Did this doctor treat him." The defendant's counsel replied: "He inserted something hypodermically into the man against his wish." The objection to the testimony was sustained, the defendant excepted and the whole deposition of the witness was excluded, under the previous ruling of the court that sections 834 and 836 of the Code of Civil Procedure applied. From the deposition, thus offered and excluded, it appeared that the witness had a conversation with Meyer, which was narrated, so far as material, as follows: "I asked him what he had been doing and he told me it was none of my damned business, that he didn't want

me in there and he wanted me to get out of there. * * * I looked around the room. * * * I found * * * a box of 'Rough on rats' * * * empty. * * * He told me he had taken it * * * because he wanted to die * * * he didn't want to get well * * * he didn't want me to do anything. * * * I prepared a hypodermic injection * * * and stimulated him, so he would not die in the Hotel Iroquois. * * * When I was going to give him the hypodermic, he said 'You, (cursing him in foul language), keep away from here. Didn't I tell you before to keep away?' I paid no attention to him and gave him the hypodermic." The witness, was, then, asked if he knew what was the cause of the condition of the man and he answered, that it was arsenical poisoning and that the symptoms evidenced it. The deceased was immediately conveyed from the hotel to the hospital; where he died soon afterwards. The evidence of Dr. Bruso was deemed inadmissible under the provisions of section 834 of the Code; which prohibits a physician from disclosing "any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." The agreement of the insured, contained in his application which waived for himself, his representatives and bene-
86 ficaries, "any and all provisions of law, now or hereafter in-force, prohibiting * * * any physician * * * attending me * * * from disclosing, or testifying to, any information acquired thereby" and which expressly consented to such testimony being given in any suit, was held below to be insufficient to meet the requirement of section 836 of the Code, that the provisions of section 834 must be expressly waived upon the trial by the personal representatives of the deceased patient. Such a waiver was refused at this trial. Our recent decision in Holden *v.* Metropolitan Life Ins. Co., (165 N. Y. 13), justified the ruling below upon the question of the force of the waiver in the insurance contract. Theretofore, it had been the rule to regard such a waiver as a binding part of the contract of insurance and, as such, available to the insurer in any action upon the policy. (Foley *v.* Royal Arcanum, 151 N. Y. 196.)

But was there disclosed that relationship of physician and patient between the deceased and Dr. Bruso, which made operative the prohibitory provisions of section 834? As the inadmissibility of such testimony is, only, because of the statute, it is quite important that the case should come very clearly within its terms; however liberal the construction, which we should give to an enactment intended to promote the ends of justice. The object of this legislation was to render privileged what communications are made between a physician and his patient; but, obviously, it is essential that it shall appear that the person attented is his patient, in the sense in which such a term is ordinarily understood. In Griffiths *v.* Metropolitan Street Railway Company, (171 N. Y. 106), we, quite lately, had occasion to consider such a question under a state of facts, not, essen-

tially, dissimilar to that now before us. In that case the plaintiff brought his action to recover damages for injuries sustained through the negligence of the defendant's servant, a gripman upon
87 one of its cars. The defendant called a physician, as a witness, who was at the scene of the accident, when an ambulance arrived, and who rendered "first aid" to the plaintiff. The witness was, also, an attending physician at the hospital, to which the plaintiff was assisted by him in the ambulance; but he rendered no further services to him while in the hospital. The witness was asked to relate a conversation, which he had with the plaintiff in the hospital, subsequently; but the court sustained an objection to its admissibility under section 834 of the Code and the witness was not allowed to testify to what was said by plaintiff with reference to his sufferings, or to the accident. When the case reached this court, it was held that the exclusion of the physician's evidence was an error; for which the judgment should be reversed and a new trial had. The decision by this court rested upon the ground that the burden upon the plaintiff of showing that the evidence was within the statutory prohibition had not been met and that the facts did not warrant the presumption that the relation of physician and patient existed. The opinion, quite fully, reviewed the cases, illustrating the application of the statutory provision in question, and that the rule was distinctly adhered to that, to warrant the application, it must appear that the relation of physician and patient, at the time, existed and that the information sought to be excluded was necessary to enable the physician to act as such. Previous to the Griffiths case that rule had been expressed in People *v.* Koerner, (154 N. Y. 355).

Can we say that the rule applies to such a situation, as that disclosed in this case, any more than it did in the Griffiths case? I think not. It seems to me to be difficult to assert, with any gravity of countenance, at least, with Meyer rejecting the witness' presence and services, and cursing him for his interference, and with the witness' determined efforts to prevent Meyer from dying in the hotel, whose servants had summoned him, that the relation
88 of physician and patient arose, and that the confidential relation existed, which the statute has in view and which, with a tender solicitude for a patient's interests, it is designed to safeguard.

The inadmissibility of the testimony of the hospital physicians rests upon a different basis. Both may, reasonably, be said to have been in attendance upon his as a hospital patient; but, in my opinion, the deposition of Dr. Bruso was erroneously excluded and, therefore, I advise the reversal of the judgment.

O'Brien, Bartlett and Martin, JJ., concur with Vann, J.; Parker, Ch. J., concurs with Gray, J.; Werner, J., absent. Judgment affirmed.

89 Supreme Court, Kings County.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant.

Please take notice, that the remittitur from the court of appeals herein was this day duly filed in the office of the clerk of Queens *court.*

Dated New York, March 18th, 1904.

J. LAWRENCE FRIEDMANN,
Attorney for Plaintiff, # 25 Broad Street,
Borough of Manhattan, New York City.

To Laurence G. Goodhart, Esq., attorney for defendant, # 13 Park row, New York city.

(Endorsed:) Supreme court, Kings county. Meyer, *vs.* Knights of Pythias,—Notice of filing of remittitur. J. Lawrence Friedmann attorney for plaintiff, # 25 Broad street, New York city. To Laurence G. Goodhart, Esq., attorney for defendant, # 13 Park *Park* row, New York city.—*Copy.*

90 At a special term of the supreme court of the State of New York, held in and for the county of Kings at the county court house of said county, on the 18th day of March, 1904.

Present: Hon. William F. Gaynor, justice.

HENRIETTA MEYER, Plaintiff-Respondent,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant-Appellant.

This cause having been brought on upon the remittitur herein sent down from the court of appeals and now filed in this court, by which remittitur it appears that an appeal was taken by the defendant from the judgment of this court to the said court of appeals, and that said appeal has been dismissed by said court, and that the judgment appealed from has been affirmed with costs, and that the record of proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law,

Now, therefore, on motion of J. Lawrence Friedman, Esq., attorney for the plaintiff, it is

Ordered and adjudged, that the judgment of the said court of appeals be, and the same is hereby made the judgment of this court; and that the plaintiff have execution against the defendant for the

costs when adjusted by the clerk and inserted in this judgment, as well as for the amount adjudged to be recovered in and by the judgments of this court in this cause, entered the 28th day of October, 1902, and the 30th day of April, 1903, and that this order or
91 judgment be annexed to the judgment-roll.

Enter in Queens county:

G.

Granted March 18th, 1904.

EDWARD KAUFMAN, *Clerk.*

(Endorsed:) Please take notice that the within is a true copy of an order herein this day duly entered and filed in the office of the clerk of this court in Queens county.

Dated New York, this 18th day of March, 1904.

Yours, J. LAWRENCE FRIEDMANN,
Attorney for Pl'ff-Resp'd't.

Office & post office address, 61 and 63 Park row, New York city, N. Y.

To Laurence G. Goodhart, attorney for def't-app'l't.

(Further endorsed:) Court of appeals, New York.—Henrietta Meyer, pl'ff-resp'd't, against The Supreme Lodge, Knights of Pythias, def't-app'l't. Order on remittitur.—J. Lawrence Friedmann, attorney for pl'ff-resp'd't. 61 and 63 Park row, World building, New York city, N. Y. To Laurence G. Goodhart, Esq., attorney for def't-app'l't.

92 Supreme Cou[illegible] Kings County.

HENRIETTA MEYER, Plaintiff,
against
THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Defendant.

A judgment in this action in favor of the plaintiff and against the defendant having been duly rendered in this court, on the 28th day of October, 1902, upon a verdict of the jury, for the sum of two thousand two hundred and forty-seven and 66/100 ($2247.66) dollars, and also for two hundred and thirteen and 37/100 ($213.37) dollars costs adjusted in said judgment; and the defendant having appealed from said judgment to the appellate division of this court, for the second department; and the said judgment having been affirmed by said appellate division of this court, and judgment of affirmance having been rendered thereon on the 30th day of April, 1903, that the plaintiff recover from the defendant the sum of one hundred and one and 50/100 ($101.50) dollars costs of said appeal; and the defendant having appealed from said judgment of affirmance to the court of appeals; and the said court of appeals having sent hither

its remittitur, filed herein on the 19th day of March, 1904, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly, and has remitted the judgment of said court of appeals to this court to be enforced according to law; and this court having, by an order entered herein the 18th day of March, 1904, ordered that said judgment be made the judgment of this court, with costs, and the
93 same having been duly adjusted by the clerk of this court at the sum of one hundred twelve and 40/100 ($112.40) dollars,

Now, on motion of J. Lawrence Friedmann, Esq., attorney for the plaintiff, it is

Order- and adjudged, that the judgment of the court of appeals be, and the same is hereby made the judgment of this court; and that the plaintiff have execution against the defendant for the costs adjusted by the clerk of this court, amounting to the sum of one hundred twelve & 40/100 ($112.40) dollars, for which amount the plaintiff hereby has judgment against the said defendant, as well as for the amount adjudged to be recovered in and by the judgments of this court, duly entered on the 28th day of October, 1902, and the 30th day of April, 1903.

Dated Jamaica, Queens county, March 21st, 1904.

D. L. VAN NOSTRAND, *Clerk.*

(The foregoing document contains the following endorsements)

Please take notice that the within is a true copy of a judgment herein this day duly entered and filed in the office of the clerk of this court.

Dated New York, this 21 day of Mar. 1904

Yours, J. LAWRENCE FRIEDMANN,
Attorney for Pl'ff-Resp'd't.

Office & post office addres- 61 and 63 Park row, New York city, N. Y.

To L. G. Goodhart, Esq., attorney for app'l't.

Supreme court, Queens county.—Henrietta Meyer, pl'ff-resp'd't against—Supreme Lodge of the Knights of Pythias, def't-app'l't. Judgment with notice of entry—J. Lawrence Friedman, attorney for resp'd't 61 and 63 Park row, World building, New York city, N. Y.—To Laurence G. Goodhart, Esq., attorney for app'l't.

94 Supreme Court of the United States.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff in Error,
against
HENRIETTA MEYER, Defendant in Error.

Know all men by these presents, that we, The Supreme Lodge, Knights of Pythias, as principal, and National Surety Company, a New York corporation, as surety are held and firmly bound unto Henrietta Meyer, the defendant above named, in the sum of thirty-five hundred dollars, to be paid to said Henrietta Meyer, her executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 2nd day of April, 1904.

Whereas, the above named plaintiff in error, The Supreme Lodge, Knights of Pythias, is about to sue out a writ of error to the United States Supreme Court to reverse the judgment in the above-entitled case by the supreme court of the State of New York.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error, The Supreme Lodge, Knights of Pythias, shall prosecute said writ to effect and answer all costs and damages, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
[SEAL.] By LAURENCE G. GOODHART,
Attorney-in-fact.

95 NATIONAL SURETY COMPANY,
By ROBERT M. NUGENT,
[L. S.] *Res. Vice-President.*

Attest: ARTHUR P. WEST,
Res. Ass't Secretary.

STATE OF NEW YORK, }
County of New York, } ss:

On the 4th day of April in the year 1904, before me personally came Laurence G. Goodhart to me known, who being by me duly sworn did depose and say that he resides in Brooklyn, New York; that he is the attorney-in-fact of the Supreme Lodge, Knights of Pythias, the corporation described in and which executed the above instrument.

NARCISO C. DONATO,
[NOTARIAL SEAL.] *Notary Public, Kings County,*

Certificate filed in New York county.

96 STATE OF NEW YORK, } ss:
County of New York, }

On this 4th day of April, 1904. before me personally appeared Robert M. Nugent, res. vice president of the National Surety Company, with whom I am personally acquainted, who being by me duly sworn, said that he resides in the county of New York; that he is the res. vice president of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the board of directors of said company, and that he signed said instrument as res. vice president of said company by like authority; and that the liabilities of said company do not exceed its assets, as ascertained in the manner provided in section 3, chapter 720 of New York Session Laws of 1893. And the said Robert M. Nugent further said that he is acquainted with Arthur P. West and knows him to be the res. ass't secretary of said company; that the signature of the said Arthur P. West subscribed to the said instrument is in the genuine handwriting of the said Arthur P. West and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said res. vice president.

[NOTARIAL SEAL.] JAMES FAWKNER,
Notary Public, No. 106, *for Kings County.*

Certificate filed in New York, Queens, Richmond and Westchester counties.

Copy of By-Law.

Be it remembered, that at a regular meeting of the board of directors of the National Surety Company, duly called and held on the 6th day of February, 1900, a quorum being present, the following by-law was adopted:

"ARTICLE XIII. SEC. 1. *Signatures Required.*—All bonds, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, shall be signed by the president, the vice-president, the second vice-president, a resident vice-president, or an attorney in fact, and, except when signed by an attorney in fact, shall have the seal of the company affixed thereto, duly attested by the secretary, an assistant secretary or a resident assistant secretary. The vice-president, second vice-president and resident vice-presidents shall each have authority to sign such instruments whether the president be absent or incapacitated or not; and the assistant secretaries and resident assistant secretaries shall each have authority to seal and attest such instruments, whether the secretary be absent or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the company as if the same were signed by the president, duly sealed and attested by the secretary."

STATE OF NEW YORK, } ss:
County of New York, }

I, Arthur P. West res. ass't secretary of the National Surety Company, have compared the foregoing copy of by-law with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original by-law.

Given under my hand and seal of the company this 4th day of April, 1904.

[L. S.]

ARTHTR P. WEST,
Res. Ass't Secretary.

97 [Endorsed:] Supreme Court of the United States. The Supreme Lodge, Knights of Pythias, plaintiff-in-error, against Henrietta Meyer, defendant-in-error. Washington, D. C., April 5th, 1904. I approve of the within bond and of the sufficiency of surety. R. W. Peckham, associate justice of the Supreme Court of the United States. Copy. Original filed in the office of the clerk of Queens county at Jamaica, New York, April 20th, 1904. D. L. Van Nostrand, clerk.

98 UNITED STATES OF AMERICA, ss:

To Henrietta Meyer, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York wherein The Supreme Lodge, Knights of Pythias is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand nine hundred and four.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

99 On this ninth day of April, in the year of our Lord one thousand nineh undred and four, personally appeared Laurence G. Goodhart before me, the subscriber, Narciso C. Donato, a notary public, duly commissioned and sworn, dwelling in the city of New York and makes oath that he delivered a true copy of the within citation to J. Lawrence Friedman Esq., attorney of record for said Henrietta Meyer therein named, in the action in the said supreme court of the State of New York.

LAURENCE G. GOODHART.

Sworn to and subscribed the 9th day of April, A. D. 1904.

[Seal of Narciso C. Donato, Notary Public, New York.]

NARCISO C. DONATO,
Notary Public, Kings County.

Certificate filed in New York county.

Service of the within citation is hereby admitted this 9th day of April 1904 at the city, county and State of New York.

J. LAWRENCE FRIEDMANN,
Attorney for Defendant-in-Error.

100 Supreme Court of the United States.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, Plaintiff-in-Error,
against
HENRIETTA MEYER, Defendant-in-Error.

Assignment of Errors.

Afterwards, to wit, on the fourth day of April, A. D., one thousand, nine hundred and four, before the honorable, the Chief Justices of the United States Supreme Court, and the honorable the associate justices thereof, in the Capitol, in the city of Washington, District of Columbia, came the said The Supreme Lodge, Knights of Pythias, by Carlos S. Hardy and Laurence G. Goodhart, its attorneys, and says that by the record of proceedings aforesaid there is manifest error in this, to wit:—

1. The trial court erred in sustaining the objection of the plaintiff, Henrietta Meyer, to the evidence offered by the defendant, The Supreme Lodge, Knights of Pythias, and in excluding and refusing to admit in evidence the answer to the following question put to Arthur McCarthy, M. D., by the defendant:—

"Q. How long did he remain at the hospital?"

2. The trial court erred in sustaining the objection of the plaintiff aforesaid, to the question set forth in the first assignment of error aforesaid on the ground that said question was incompetent and improper, also that it was privileged, that any knowledge
101 obtained by this physician was obtained while he was acting as physician for the decedent, and is not admissible unless expressly waived at the trial, and we (the plaintiff aforesaid) hereby state that we do not waive any of the privileges given to us by sections 834 and 836 of the Code, and hereby object to its admissibility.

3. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the answer to the following question, put to Arthur McCarthy, M. D., by the defendant:—

"Q. Let us have your complete diagnosis of the case at that time?"

4. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the answer to the following question, put to Arthur McCarthy, M. D., by the defendant:—

"Q. Will you give us the details of his condition?"

5. The trial court erred in ruling upon the trial with respect to the testimony of C. Frank Bruso, M. D., as to whom the defendant contended that the relationship of physician and patient did not arise between said witness and Mr. Meyer (the decedent) that

"If he did not treat him and he was not his physician, read it all."

6. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the words "suffering intense pain and vomiting" in the answer of the said witness C. Frank Bruso, M. D., to a question propounded by the defendant aforesaid and which said answer in full is as follows:

102 "I found a man lying in bed there, suffering intense pain and vomiting."

7. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the rest of the deposition of the witness, C. Frank Bruso M. D., set forth in the record and proceedings herein.

8. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the deposition of the witness, William Irving Thornton M. D., set forth in the record of proceedings herein.

9. The trial court erred in sustaining the objection of the plaintiff aforesaid to the evidence offered by the defendant aforesaid and in excluding and refusing to admit in evidence the certificate of the physician (William Irving Thornton) attached as an exhibit to the record of proceedings herein.

10. The trial court erred in denying and refusing to grant the motion made by the defendant aforesaid to dismiss the complaint of the plaintiff aforesaid.

11. The trial court erred in charging the jury, against the exception of the defendant aforesaid as follows, to wit:

"I have excluded the evidence of the physicians and surgeons "who attended him, because the law excludes it. When you em- "ploy a doctor he may not come into court and disclose what he "learns in the treatment. It is not permitted. * * * That is "well established in our law"

12. The trial court erred in directing judgment for the plaintiff aforesaid and against the defendant aforesaid, upon the rendition of the verdict of the jury, for the sum of $2,240.66.

13. The trial court erred in denying the motion of the defendant aforesaid to set aside the verdict and for a new trial upon all
103 the grounds specified in § 999 of the Code of Civil Proceedure of the State of New York and in entering the order of the 23rd day of October, 1902, to that effect.

14. The trial court erred in entering the judgment of October 28th, 1902, against the defendant aforesaid and in favor of the plaintiff aforesaid for the sum of $2462.03, and in granting execution to the plaintiff aforesaid against the defendant aforesaid upon the foregoing judgment.

15. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding the opinion of the court, affirming said judgment, as follows, to wit:

"These several exceptions distinctly raise the question whether "sections 834 and 836 relate to cases where physicians professionally "attend a patient who does not voluntarily require their services. "There is no evidence that Meyer employed any one of these physi- "cians, but it is none the less true that they attended him in no other "than a professional capacity. Section 834 forbids any physician "'to disclose any information which he acquired in attending a pa- "'tient, in a professional capacity, and which was necessary to en- "'able him to act in that capacity.' The language is broad enough "to cover cases of medical attendance, whether such attendance re- "sults from the voluntary call of the patient upon a physician or "from the exigencies of the patient's situation. If the relation is "that of a physician attending a patient in a professional capacity, "no matter how the relation was brought about, the sections apply."

16. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding in the opinion of the court, affirming said judgment, as follows, to wit:

"Section 836 provides that section 834 applies to any ex-
104 amination of the physician 'unless the provisions thereof are expressly waived upon the trial or examination * * * by the patient * * * But a physician * * * *But a physician* * * * may upon a trial or examination disclose any information as to the mental or physical condition of a *a* patient who is deceased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient.' The

record shows that the plaintiff did not waive the privilege either on the trial or examination of any of the physicians; and even where the personal representatives waive the privilege, the physician is forbidden to disclose any fact which would tend to disgrace his memory."

17. The appellate division of the supreme court of the State of New York, in and for the second judicial department thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellate, The Supreme Lodge, Knights of Pythias, to set aside the aforesaid verdict and for a new trial, erred in holding in the opinion of the court affirming said judgment, as follows, to wit:—

"The defendant contends that the plaintiff at the trial waived the physician's privilege by offering in evidence Meyer's application for insurance, which contained a waiver of the provisions of sections 834 and 836, but the court of appeals has held the contrary in Holden *v.* Metropolitan Life Insurance Co. (165 N. Y. 13), and thus set at rest a question which has been much litigated."

18. The appellate division of the supreme court of the State of New York, in and for the second judicial department, thereof, upon the appeal taken thereto from the aforesaid judgment and the aforesaid order denying the motions of the appellant, The Supreme Lodge, Knights of Pythias, to set the aforesaid verdict aside and for a new trial, erred in holding in the opinion of the court, affirming the judgment, as follows, to wit:—

"There was no error in the exclusion of the testimony in question, and the judgment and order should be affirmed."

105 20. The appellate division of the supreme court of the State of New York, in and for the second judicial department upon the appeal aforesaid erred in making and entering its order affirming on appeal said judgment and order so appealed from, which said order of affirmance is dated the 24th day of April, 1903, and contained in the record of proceedings herein.

21. The supreme court of the State of New York in and for the county of Queens, erred in entering its judgment dated the 30th day of April, 1903, affirming the aforesaid judgment and order so appealed from as aforesaid, to said appellate division which said judgment of said 38th day of April, 1903, is contained in the record of proceedings herein.

22. The court of appeals of the State of New York upon the appeal thereto taken from the aforesaid judgments and orders, erred in holding in the opinion of said court, affirming said judgments and orders as follows, to wit:—

"Upon this appeal, in substance, the general argument of the appellant (The Supreme Lodge, Knights of Pythias) is that the waiver of the deceased, contained in his application for the insurance certificate, of all provisions of law, then, or thereafter, in force, prohibiting any physician from testifying to any information acquired by attendance upon him, was a part of a contract, which had been val-

idly made in the State of Illinois, and that sections 834 and 836 of the Code of Civil Proceedure of this State, under which such testimony is rendered inadmissible, unless the statutory prohibition is waived upon the trial by the personal representatives of the deceased, are inoperative, as being in violation of the provisions of the Federal Constitution, which prohibit legislation in impairment of contracts * * * With respect to the first of these questions raised by the appellant, (the one just quoted) whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made his application for the insurance. The certificate issuing upon the application, appears from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant, followed by the words, 'Dated at New York, this 28th day of
106 September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P.' By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter named,' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement endorsed upon the certificate: namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that it was binding upon either party to it until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him."

And the said court further erred in its opinion wherein Mr. Justice Vann says:—

"* * * I agree with Judge Gray in his conclusion as to the first question considered by him."

23. The court of appeals of the State of New York upon the said appeal thereto erred in affirming the judgments so appealed from and the order so appealed from with costs.

24. The court of appeals of the State of New York erred in granting to the plaintiff-respondent, Henrietta Meyer, a remittitur remitting the proceedings in said court to the said supreme court of the State of New York, in and for the county of Queens, in accordance with said opinion for error in which the last error was assigned.

25. The supreme court of the State of New York, in and for the county of Queens, erred in making and entering the order of March 18th, 1904, wherein and whereby it was ordered and adjudged that the aforesaid judgment of the court of appeals be and the same was made the judgment of said the supreme court of the State of New York, in and for the county of Queens.

107 26. The supreme court of the State of New York, in and for the county of Queens, erred in making and entering the judgment of affirmance of March 21st, 1904.

And the said plaintiff-in-error prays that the judgments and orders aforesaid for the errors aforesaid, all of which appear upon the face of said record of proceedings aforesaid, and other errors in the record of proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that a mandate of this honorable court to that effect may issue therein to the said the supreme court of the State of New York, in and for the county of Queens, and that the said plaintiff-in-error may be restored to all things which it has lost by the occasion of said judgments and orders.

CARLOS S. HARDY,
LAURENCE G. GOODHART,
Attorneys for Plaintiff-in-Error.

Office & P. O. address, 17 Park row, borough of Manhattan, New York city, New York.

108 [Endorsed:] The Supreme Court of the United States. The Supreme Lodge, Knights of Pythias plaintiff-in-error, against Henrietta Meyer defendant-in-error. Original. Assignment of errors. Carlos S. Hardy and Laurence G. Goodhart, attorneys for pl'ff-in-error 13–21 Park row, borough of Manhattan, New York, N. Y.

109 [Endorsed:] File No. 19,309. Supreme Court U. S. October term, 1903. Term No. 658. The Supreme Lodge Knights of Pythias, pl'ff in error, *vs.* Henrietta Meyer. Assignment of errors. Filed May 9", 1904.

Endorsed on cover: File No. 19,309. New York supreme court. Term No. 234. The Supreme Lodge, Knights of Pythias, plaintiff in error, *vs.* Henrietta Meyer. Filed April 25th, 1904. File No. 19,309.

FILE COPY.

Office Supreme Court U.
FILED
MAR 25 1905
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 234

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

HENRIETTA MEYER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF OF PLAINTIFF IN ERROR.

CARLOS S. HARDY AND
LAURENCE G. GOODHART,
Attorneys for Plaintiff in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 234

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error.

vs.

HENRIETTA MEYER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF OF PLAINTIFF IN ERROR.

PROCEEDINGS IN THE CASE.

The plaintiff, Henrietta Meyer, is the person named in a certain benefit certificate as payee of the fund therein described, and the defendant, The Supreme Lodge, Knights of Pythias, issued the said benefit certificate at the City of Chicago, and State of Illinois.

See paragraph second of complaint and certificate of membership thereto annexed (Rec., fols. 4 to 7 inclusive).

The plaintiff in error is a federal corporation, organized under the act of Congress, approved June 29, 1894.

(See paragraph first of complaint, Rec., fol. 3.)

The plaintiff on the 30th day of December, 1901, brought this action in the Supreme Court of Queens county, in the

State of New York, to recover the sum of two thousand ($2,000) dollars on said benefit certificate.

(See complaint, Rec., fols. 3 to 7 inclusive.)

The defendant, on the 20th day of January, 1902, offered to allow judgment to be taken against it by the plaintiff for the sum of three-hundred and fifty-three and 76/100 dollars, with interest from the 29th day of September, 1900, to the date of the offer, with costs.

(See offer of judgment, Rec., fol. 7.)

Thereafter and on the same day the defendant interposed an answer in which it pleaded, that the death of Emanuel Meyer, to whom was issued the benefit certificate in question, resulted from suicide, in that, he did deliberately kill himself, and that pursuant to the terms of the by-laws and contract between him and the defendant, there became and was due from the defendant to the plaintiff the sum only for which judgment had been offered.

(See answer, Rec., fols. 8 to 15 inclusive.)

Thereafter, upon the issues thus raised, the case was called for trial on the 21st day of October, 1902, at the court house of said court, before Hon. William J. Gaynor, justice, and a jury, and after a trial of said issues there was left to said jury by the learned trial justice for answer the following question: "Did the deceased commit suicide?" and said jury did answer: "No" thereto, and the court did thereupon direct judgment for the plaintiff in the sum of two thousand two hundred and forty and 66/100 dollars.

(Trial Minutes, Rec., fol. 16.)

Judgment was thereupon and on the 28th day of October, 1902, entered in the sum of two thousand four hundred and sixty-two and 03/100 dollars, which, by an order of said court, was duly reduced, on the 12th day of November,

1902, to two thousand four hundred and forty two and 03 100 dollars.

(Rec., fols. 17 and 18.)

On the 23rd of October, 1902, a motion for a new trial, pursuant to the Code of Civil Procedure of the State of New York, was made and denied.

(Rec., fol. 19).

Thereafter, and on the 19th day of November, 1902, the defendant appealed to the Appellate Division of the Supreme Court of the State of New York, for the second judicial department, from said judgment of two thousand four hundred and forty-two and 03/100 dollars, and from said order denying said motion for a new trial.

(Rec., fol. 20.)

Thereafter, said appeal came on to be heard before said Appellate Division of the Supreme Court of the State of New York, which affirmed said judgment and said order of the court below.

(See order of affirmance, Rec., fol. 71 and 72.)

The opinion of said Appellate Division of said Supreme Court of the State of New York, will be found at Rec., fols. 67 to 71, inclusive.

Thereafter, and on the 30th day of April, 1903, a judgment affirming the aforesaid judgment with one hundred and one and 50/100 dollars costs, was entered in the office of the clerk of Queens county, New York.

(Rec., fols. 72 and 73.)

Thereafter, and on the 8th day of May, 1903, the defendant appealed therefrom to the Court of Appeals of the State of New York.

(See notice of appeal, Rec., fols. 73 and 74.)

Thereafter, said appeal coming on to be heard, the said Court of Appeals did affirm said judgment, as will appear by the *remittitur*, dated March 16, 1904.

(Rec., fols. 76 and 77.)

The opinion of the majority of said court affirming said judgment will be found at Rec., fols. 78 to 82, inclusive, and the minority opinion of said Honorable court will be found at Rec., fols. 82 to 88, inclusive.

Thereafter, an order was made and entered on the 18th day of March, 1904, in the office of the clerk of Queens County, New York, by which said order the aforesaid judgment of affirmance of said Court of Appeals of said State of New York was made a judgment of the Supreme Court of the State of New York, in and for the County of Queens.

(See Rec., fols. 90 and 91.)

And, thereafter, and on the 21st day of March, 1904, a judgment of affirmance was entered in said office of the clerk of Queens County, affirming the aforesaid judgments with one hundred and twelve and 40/100 dollars costs.

(See Rec., fols. 92 and 93.)

Thereafter, and on the second day of April, 1904, the defendant gave its bond as plaintiff in error, in accordance with law, and sued out a Writ of Error, which was allowed by Hon. Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, on the fifth day of April, 1904.

(See Rec., fols. a and b.)

And, thereafter, and for cause of error, this plaintiff in error filed its assignment of errors in this Honorable court.

(See Rec., fols. 100 to 107, inclusive.)

STATEMENT OF THE CASE.

On September 6, 1894, Emanuel Meyer, late husband of the defendant in error, made his certain written application upon the form prescribed and furnished by the plaintiff in error to the Board of Control, Endowment Rank, Knights of Pythias, for membership in said Endowment Rank of plaintiff in error, and asked that a benefit certificate for the sum of two thousand dollars be issued to him, payable to his wife, Hattie Meyer, the defendant in error.

(Rec., pages 34-36.)

Upon this application, a certificate of membership for the sum of two thousand dollars was issued to said Emanuel Meyer, in which the defendant in error was named as beneficiary.

(Rec., pages 32-33.)

This certificate of membership was issued by the plaintiff in error, as appears by the In Testimonium clause thereof, at Chicago, Illinois, on the 20th day of September, 1894.

On the 29th day of September, 1900, Emanuel Meyer departed this life at the Iroquois Hotel, in the City of Buffalo, County of Erie and State of New York.

(Rec., fol. 24, 56.)

Upon the trial of this action, at *nisi prius*, the plaintiff in error offered in evidence the following documents which were received without objection or exception on the part of the plaintiff there, the defendant in error here:

a. The certificate of membership; (Rec., fols. 49-51).

b. Application upon which said benefit certificate was issued; (Rec., fols. 51-55).

c. Proofs of death submitted in this case; (Rec., fols. 60–64).

d. Physician's proof of death; (Rec., fols. 55–59).

e. The inquisition of the coroner, not printed as part of this record.

Counsel for the defendant below thereupon undertook to read certain depositions, and the main question in this case relates to the admissability of the testimony of certain medical witnesses, taken upon deposition, and sought to be introduced by the defendant below upon the trial of this action.

The material parts of such deposition which indubitably prove that Emanuel Meyer came to his death by his own hand, and as the result of deliberate suicide, were excluded by the trial court, upon the objection of counsel for the plaintiff below and against the exception of this plaintiff in error, and said depositions so offered and excluded, are printed in the record herein.

(Rec., fols. 25-40; Trans., fols. 16-27.)

The trial court submitted to the jury the question, "Did Emanuel Meyer commit suicide"? and the jury having answered "No," directed judgment in favor of the plaintiff and against the defendant, which said judgment having been sustained in the highest court in the State of New York, to which an appeal could of right be taken, to-wit, the Court of Appeals of the State of New York, the defendant there, comes here as plaintiff in error, and for this and other manifest errors in the record aforesaid, asks this Honorable Court to cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done in the premises.

The facts appearing by the record herein, which it is desired to call particularly to the attention of the court are the following:

One Emanuel Meyer on September 6, 1894, made his certain application in writing to the defendant for membership in said Endowment Rank (Rec., fols. 152-163), and there was issued to him a certain certificate of membership (Rec., fols. 14-20). In said application there are three clauses which the plaintiff in error earnestly asks this court to consider. The first is found at Rec., fols. 158-159:

> "And I hereby, for myself, my heirs, assigns, repre-"sentatives and beneficiaries expressly waive any and "all provisions of law, now or hereafter in force, pro-"hibiting or excusing any physician heretofore or here-"after attending me professionally or otherwise, from "disclosing or testifying to any information acquired "therby, or making such physician incompetent as a "witness; and hereby consent that any such physician "may testify to and disclose any information so derived "or received in any suit or proceeding wherein the "same may be material."

The second is found at Rec., fol. 150, and reads as follows:

> "It is agreed that if death shall result by self-de-"struction, whether sane or insane, voluntary or invol-"untary, or if death is caused or superinduced by the "use of intoxicating liquors, or by the use of narcotics "or opates, or in consequence of a duel, or by the "hands of justice, or in violation of, or attempt to vio-"late any criminal law, then the certificate issued upon "this application shall be null and void, and all claims "on account of such membership shall be forfeited."

This absolute forfeiture was afterward modified by an amendment to the by-laws of plaintiff in error providing

for part payment in case of suicide upon a calculation which resulted in the offer of judgment (Rec., fol. 21).

The third is at Rec., fol. 161, and is as follows:

> "It is agreed that membership shall not begin, and "the certificate of membership shall not be binding, or "in force or effect until this application has been ac- "cepted by the Board of Control, and all required fees "and the first monthly payment has been paid to said "board."

When the plaintiff in error received notice of the death of said Emanuel Meyer, the usual blanks were furnished in order that proofs of death might be made. The attention of the court is respectufily called to the question and answer found in the physician's proof of death at Rec., fol. 170:

> "10. Was death caused by suicide or violence, or "from other than natural causes? If so, state particu- "lars. Suicide. Patient said he was in trouble and "took a white powder, which preceded the above "condition which led to his death."

By Article XII of the by-laws of the plaintiff in error (Rec., fols. 190-192) it was necessary for the beneficiary to furnish proofs of death, and among them the physician's proof. The court admitted the same in evidence (Rec., fol. 61), and it is respectfully urged that said proof of death must be deemed in evidence in this case.

Thereupon the plaintiff in error offered to prove the fact by the testimony of Dr. Bruso, which had been taken by deposition in regular course. That deposition was offered, and although Dr. Bruso did *not* acquire knowledge of the facts sought to be proved at the trial, in order to treat Meyer, and knowledge of such facts was *not* necessary for the treatment given by him, the deposition was excluded over the exception of the plaintiff in error.

The plaintiff in error also sought to prove the same fact (that Meyer had suicided) by the depositions of Dr. Thornton and Dr. McCarthy. On objection these depositions were also excluded, and defendant again excepted.

The plaintiff in error makes the following contentions:

I. That the waiver contained in the application of Emanuel Meyer, so far as it affects the testimony of the physicians attending him, was valid, part of the contract between the parties upon which the plaintiff sued, of the essence thereof, and of the substance thereof, and that the learned trial court erred in ruling to the contrary.

II. That section 836 of the Code of Civil Procedure of the State of New York is not a mere rule of evidence when applied to a case like that of the case at bar, but impairs the obligation of the contract made in, in contemplation of, and pursuant to the laws of the State of Illinois, which is the contract in suit in the case at bar.

III. That the relationship of physician and patient never arose between Dr. Bruso and Emanuel Meyer, and that the exclusion of the deposition of Dr. Bruso by the learned trial court constituted reversible error.

IV. That the fact sought to be proved, although acquired by Dr. Bruso *from* Meyer was not "necessary to enable him (Bruso) to act in that (professional) capacity;" *i. e.*, the fact that Meyer had taken poison with suicidal intent, and that for that reason the deposition was improperly excluded.

V. That the decision in the case of *Holden* vs. *Metropolitan Life Ins. Co.*, (165 N. Y., 13), should be confined to Old Line insurance companies, and not extended to mutual benefit societies of the class of the plaintiff in error.

VI. That the Holden case (*supra*) is wrong both on principle and authority as applied to the case at bar, and

the decision therein should be overruled or limited in its application.

VII. That the exclusion of the affidavit of the attending physician (Rec., fols. 164-173), at Rec., fols. 129-130, constituted reversible error, to the great prejudice of the plaintiff in error, as the same had already been admitted in evidence without objection by the defendant in error (Rec., fol. 61), the same being set forth at (Rec., fols. 164-174).

VIII. That the attempted application of Section 834 of the Civil Code of Procedure of the State of New York to the contract in the case at bar, is a violation of the federal constitution.

IX. That the same is an unconstitutional and unwarranted interference by the Legislature of the State of New York with the contract and right of contract between Meyer and the plaintiff in error. And, as such, void in its application to the contract at bar.

X. That the contract at bar is an Illinois contract, and must be construed with regard to the law of that jurisdiction. There being no evidence of what that law is, it must be adduced from the reported decisions of the courts of that State, or assumed by this Honorable court to be what the common law of the State of New York is.

XI. That under the common law of the State of New York the evidence of Dr. Bruso was admissible in evidence, and its exclusion constituted reversible error.

XII. That under the decisions of the courts of the State of Illinois, it is the well settled law of that jurisdiction that the evidence in question was admissible.

XIII. That the question of whether or not the contract in suit is a contract within the protection of the non-impairment clause of the Federal Constitution, is a federal question to be tested by the decisions of the federal courts

upon that question by which the New York courts are bound and which they must follow.

SPECIFICATION OF ERRORS.

These are all set forth in the record.
(Rec., fols. 100-109.)

First.

ERROR AS TO REFUSAL TO PERMIT THE PROOF OF THE SUICIDE OF EMANUEL MEYER CONTAINED IN THE DEPOSITIONS OFFERED AND EXCLUDED.

The trial court erred in the rejection of the following evidence:

"Q. Let us have your complete diagnosis of the case "at that time.

"Plaintiff in error's counsel: We renew the objection on "all the grounds stated.

"The Court: I have already ruled," *i. e.* [sustain the objection],

"The plaintiff in error excepted."

The trial court further erred in sustaining the objection of the defendant in error and refusing to admit in evidence and excluding therefrom the deposition of C. Frank Bruso, M. D., as the same is set forth on pages 16 and 17 of this record.

The trial court further erred in sustaining the objection of the defendant in error and refusing to admit in evidence and excluding therefrom the deposition of Dr. William Irving Thornton as the same is set forth on pages 17-27 of this record.

The trial court further erred in refusing to admit in evidence and excluding therefrom the certificate of the physician, which said certificate is set forth at Rec., fols. 55–59.

The trial court further erred in charging the jury as follows:

"I have excluded the evidence of the physicians and surgeons who attended him on the ground that they attended the deceased professionally."

SECOND.

REFFUSAL OF THE TRIAL COURT TO GRANT MOTIONS TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL.

After the rendition of the verdict the defendant moved to set aside the verdict aforesaid on the ground that the same is against the evidence, against the weight of evidence and contrary to law; and for a new trial, upon the judge's minutes, upon the same grounds. These motions were denied and exceptions taken by the plaintiff in error and from the order confirming said denial, as well as from the hereinafter set forth judgment, an appeal was duly taken.

THIRD.

THE ENTRY OF JUDGMENT IN FAVOR OF THE DEFENDANT IN ERROR AND AGAINST THE PLAINTIFF IN ERROR FOR THE FULL AMOUNT OF THE BENEFIT CERTIFICATE HEREIN, WITH INTEREST AND COSTS, BY THE TRIAL COURT, IS HEREBY SPECIFIED AS ERROR.

Said judgment was entered on the 28th day of October, 1902, in the sum of two thousand, four hundred and sixty-two and 03/100 dollars, damages and costs, and execution awarded against the defendant, which said judgment was thereafter reduced by order to the sum of two thousand, four hundred and forty-two and 03/100 dollars.

FOURTH.

THE AFFIRMANCE OF SAID JUDGMENT AND SAID ORDER DENYING MOTION FOR A NEW TRIAL, BY THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOR THE SECOND JUDICIAL DEPATMENT, IS HEREBY SPECIFIED AS ERROR.

The said Appellate Division of the Supreme Court for the Second Judicial Department held that the evidence of the said medical witnesses was inadmissable, and upon the *remittitur* of said court, judgment of affirmance was entered on the 30th day of April, 1903, and from said judgment and order of affirmance, appeal was duly taken to the court of last resort open to this plaintiff in error in said State of New York, to-wit, the Court of Appeals thereof.

FIFTH.

THE OPINION OF THE COURT OF APPEALS AFFIRMING THE JUDGMENT BELOW, WHEREIN SAID HONORABLE COURT HOLDS THAT SECTIONS 834 AND 836 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, UNDER WHICH THE AFORESAID MEDICAL TESTIMONY WAS EXCLUDED, DO NOT CONTRAVENE THE INHIBITION OF THE FEDERAL CONSTITUTION, WHICH PROHIBITS A STATE TO PASS AN ACT IMPAIRING THE OBLIGATION OF A CONTRACT, IS HEREBY SPECIFIED AS ERROR.

(See first paragraph of opinion of GRAY, J. [dissenting], and last paragraph of opinion of Vann, J. [writing majority opinion].)

The proceedings which thereafter resulted in the entry of a judgment of affirmance upon the remittitur of said Court of Appeals, is hereby specified as error. These proceedings will be found set forth in detail in the record.

Sixth.

THE HOLDING BY EACH OF THE COURTS, TO-WIT: THE TRIAL COURT, THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT, AND THE COURT OF APPEALS OF THE STATE OF NEW YORK, THAT THE RELATIONSHIP OF PHYSICIAN AND PATIENT AROSE BETWEEN DR. BRUSO AND EMANUEL MEYER, IS HEREBY SPECIFIED AS ERROR.

This will be argued in the points, *post*.

Seventh.

THE EXCLUSION OF THE CERTIFICATE OF THE PHYSICIAN, TO WHICH REFERENCE HAS HEREINBEFORE BEEN MADE, FROM THE EVIDENCE IN THIS CASE, AFTER THE SAME HAD BEEN DULY ADMITTED IN EVIDENCE WITHOUT OBJECTION OR EXCEPTION, IS HEREBY SPECIFIED AS ERROR.

This will be argued in the points, *post*.

Eighth.

THE RULING OF SAID COURTS THAT THE ADMISSION WITHOUT OBJECTION OR EXCEPTION ON THE PART OF THE PLAINTIFF BELOW OF SAID CERTIFICATE OF SAID PHYSICIAN, OFFERED AS PART OF THE PROOFS OF DEATH, AND THEREAFTER EXCLUDED, WHEN ATTEMPTED TO BE READ UPON THE TRIAL, DID NOT CONSTITUTE A WAIVER OF THE STATUTE IN QUESTION, IS ALSO SPECIFIED AS ERROR.

This will be argued in the points, *post*.

POINT ONE.

The terms of the benefit certificate issued by the plaintiff in error to Emanuel Meyer, the laws and rules of the plaintiff in error, together with the application for membership by Emanuel Meyer, constitute the contract which existed between the member and the society, which instruments construed together measure the rights of the litigants, and are binding in all respects upon the defendant in error.

Sabin vs. *Phinney*, 134 N. Y., 143.
Hellenberg vs. *District No. 1*, 94 N. Y., 580.
Sanger vs. *Rohschild*, 123 N. Y., 577.
Niblack on M. B. Societies, Section 166.
Grossman vs. *The Supreme Lodge*, 13 St. Rep., 592.
Fullenwider vs. *Royal League*, 180 Ill., 625.

Whatever rights the defendant in error has depend upon the benefit certificate issued to Emanuel Meyer, his application for membership and the constitution and by-laws of the plaintiff in error corporation.

Grossman vs. *The Supreme Lodge, supra.*

In the application for membership Emanuel Meyer agreed that self destruction should avoid the certificate issued upon said application (Rec., fol. 160), and he further expressly waived any and all provisions of law then or thereafter in force prohibiting or excusing any physician thereafter attending him professionally or otherwise from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and he further consented that any such physician might testify to and disclose any information so derived or received, in

any suit or proceeding where the same might be material (Rec., fol. 158-159).

It was, therefore, competent for the plaintiff in error to introduce the evidence which the learned trial court excluded, tending to prove that Emanuel Meyer came to his death by his own desire and by means of his own act in swallowing a fatally toxic quantity of poison.

POINT TWO.

The contract in suit is within the protection of the non-impairment clause of the Federal Constitution.

We have seen (Point One, *supra*), that this is a contract made up of the terms of the benefit certificate, the laws of the defendant, and the application for membership. This is no longer an open question.

Emanuel Meyer "willingly and freely subscribed to all" of the application (Rec., fol. 163). It is, therefore, beyond all question that this is a contract entered into with the *assent* of both parties; that their minds met and a contract arose, such as is embraced within the meaning of that term as used in the federal constitution.

FEDERAL CONSTITUTION.

Article I, Section 9, Clause 7.

This contract is therefore, not to have its obligations impaired by any act of the state of New York.

15 Encyc. of Law, 2d Ed., 1032.

The plaintiff in error is not a resident of the state of New York, but is a federal corporation, organized under the act of the Congress of the United States, approved by the president, June 29, 1894, and the Amendatory Act approved by the president June 7, 1900.

See Complaint, Rec. fol. 9.

The contract in suit consisted of an offer (the application) made on the 6th day of September, 1894 (Rec., fol. 152), and its acceptance (Rec., fol. 161).

Pursuant to the terms of the offer, the last act which changed the offer of Meyer into a contract between him and the defendant; that is, the acceptance of the offer, was the issuance of the certificate (Rec., fol. 161), and no other act, matter or thing was necessary after such acceptance was evidenced in this record to create the obligation of contract on the part of the defendant, and the one party being bound by the *contract*, it of necessity follows that the other party was likewise bound by the *contract*.

The acceptance of this offer, which was the act of the creation of the contract between the parties, took place at Chicago, in the State of Illinois, on the 20th day of September, 1894, by the execution of the certificate of membership (Rec., fol. 149). Nothing then remained to be done. The contract had arisen, and the acceptance which made up a contract, took place within the jurisdiction of the State of Illinois.

It is, therefore, an Illinois contract, and the lex loci celebrationis applies.

22 Ency. of Law, 2d Ed., 1324.
Bascom vs. *Zediker*, 48 Neb., 380.
Waldron vs. *Ritchings*, 9 Abb. Pr. N. S., 359.
Armstrong vs. *Best*, 112 N. C., 59.
Equitable Life Society vs. *Clements*, 140 U. S., 226.
Carrollton vs. *Am. Credit Co.*, 124 Fed. R., 25.
Shelton vs. *Haxtun*, 91 N. Y., 124.
McIntyre vs. *Parks*, 3 Metc., 207.
Milliken vs. *Pratt*, 125 Mass., 374.
Gay vs. *Rainey*, 89 Ill., 221.

Buchanan vs. *Drovers' Nat. Bank of Chicago*, 55 Fed. Rep., 223.
Western T. & C. Co. vs. *Kilderhouse*, 87 N. Y., 430.
Merchant vs. *Chapman*, 4 Allen, 362.
Sands vs. *Smith*, 1 Neb., 108.
Hosford vs. *Nichols*, 1 Paige's Ch., 220.
Jewell vs. *Wright*, 30 N. Y., 264.
Merchant's Bank vs. *Griswold*, 72 N. Y., 480.
Dickinson vs. *Edwards*, 77 N. Y., 576.

The case of the *Equitable Life Assurance Company* vs. *Clements*, 140 U. S., 226 (*supra*), came up to this Honorable Court on error to the Circuit Court of the United States for the Western District of Missouri. In that case the question was as to the applicability of a Missouri statute providing a rule of commutation upon default in payment of premiums on the policy and the decision turns upon whether the contract was a New York or Missouri contract.

The facts were that the application was made in Missouri. The defendant admitted that the policy was "at the request of said Wall, transmitted to the state of Missouri and was delivered to said Wall in said state," and the court says at page 232, Mr. Justice GRAY writing the unanimous opinion of the court:

> "If this form of admission does not imply that the policy was, at the request of Wall, transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the

> policy to him in Missouri. Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy, and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

Applying this decision to the case at bar, we find that the essence of the rule laid down by this Honorable Court *is that the contract arises where the last essential act looking to its completion* is of necessity to be performed.

In the case just cited, the last essential act was the payment of a premium during the lifetime of the assured and the delivery of the policy to him during his life. It was then that the contract arose, and not until then, and the place where that last essential act necessary to change an offer to insure, into a contract of insurance, took place, was in the State of Missouri. Wherefore, the court reaches the only possible conclusion, to-wit, that this was a Missouri and not a New York contract.

In the case at bar the last essential act necessary to change the offer, made by the application, into a contract of insurance, was the acceptance of the application of Emanuel Meyer which could only be accepted at the home office of the society by the board of control and the evidence of the acceptance of which in this record is found in the wording of the *In Testimonium* clause of the certificate (Rec., fol. 19) to have been in the City of Chicago, State of Illinois.

The conclusion is irresistible upon the rule of this Honorable Court announced in the Clement's case, *supra*, that the contract arose in, was made with reference to the law of and is in all respects an *Illinois contract*.

The very late case of *Carrollton Furniture Manufacturing Co.* vs. *The American Credit Indemnity Company.* 124 Fed Rep. (*supra*), was decided in the Circuit Court of Appeals for the Second Circuit on a reargument, on July 1, 1903, and supports the contention of the plaintiff in error in the case at bar. That was a contract of credit indemnity and in the opinion of WALLACE, Circuit Judge, concurred in by the rest of the court, he says. quoting the Clements case (*supra*);

> "The conclusion is inevitable that the policy never became a complete contract binding both parties to it, until the delivery of the policy and the payment of the first premium in *Missouri* and consequently that the contract is a Missouri contract and governed by the laws of that state."

This is upon the theory that the last essential act was the payment of the first premium in the State of Missouri during the lifetime of the person proposed to be insured.

The policy in the Carrollton case, just cited, provided also:

> "That no claim shall be provable under it for a loss accruing prior to the payment of the premium even though the policy has been delivered prior to such payment."

The court says, at page 27:

> "Thus the application was made in Kentucky, the policy was accepted in Kentucky and the premium was paid in Kentucky;"

and the payment of that premium was the *conditio sine qua non* to any liability arising upon the policy. From the previous quotation it will be seen that the last essential act was the payment of the premium and the court specifically holds that that act, being the last essential act necessary to

change the offer to insure into a contract of credit indemnity insurance, having taken place in the State of Kentucky, the contract was a Kentucky and not a New York contract.

An application of this doctrine to the case at bar, will make it clearly evident that the Circuit Court of Appeals for the Second Circuit adopts the reasoning and enforces the decision of this Honorable Court, as laid down in the Clements case cited. It follows, therefore, that the contract in the case at bar was completed in and is, without any possibility of question, an Illinois and not a New York contract.

To the same effect are the tests laid down in the following cases:

In *Bascom* vs. *Zediker*, 48 Neb. (*supra*), where the question was whether a note was usurious and this turned upon the further question of whether it was a New York or Nebraska contract. After certain preliminary negotiations which had taken place in the State of New York, it was agreed at the City of Troy, in the State of New York, that Banscom was to lend Zediker $10,000, for which Zediker was to execute his promissory note, drawing interest at 10 per cent per annum and pay Bascom a bonus of $100 for making this loan. Later, Zediker, then being in Grand Island, Nebraska, wrote Bascom, at Troy, N. Y., a letter in which he asked for the money for the purpose of getting certain stock of the First National Bank; stated the terms under which he was willing to borrow the money and added "write me here at Grand Island, I will be here until the last of the month." An answer was sent to this by Bascom's secretary, at Troy, N. Y., in which the announcement was made that upon certain conditions the loan would be made. Later, Zediker replied to that letter re-

stating the terms upon which he was willing to borrow and upon the same day wrote from Grand Island, Nebraska, a letter in which he said:

> "Herein find promissory note for $10,000 at 10 per cent. interest on one year's time signed by myself and "

The note was received by Zediker in New York, and in New York Zediker filled the date of September 13th in the note and transmitted to the cashier of the First National Bank of Franklin, Nebraska, the sum of $9,900, to be paid to Zediker on his delivering to said cashier for Bascom 100 shares of the capital stock of the First National Bank of Franklin, Nebraska. The stock was so delivered by Zediker to the cashier and the money paid over. The note sent was payable to Bascom at Troy, N. Y.

Upon this state of facts the court held that the contract, *i. e.*, the note was made in and governed by the laws of the State of Nebraska. This is only upon the theory that the signing of the note by Zediker (the maker) was the last essential act necessary to constitute the negotiable paper into the ordinary contract contained in and evidenced by a promissory note, and that said contract arose in the jurisdiction where that last essential act was performed.

It might possibly be argued that since Bascom was given authority to date the note and did date it in the State of New York, and that the note was incomplete until dated, that this would have made it a New York contract, but the dating of the note is no essential part of the contract, and it need not be argued here that the sending of a signed promissory note to the payee with the date left blank and with authority to the payee to fill in the date upon receipt of the note, does not constitute the dating of the note in any sense an act essential to cause the obligation under it

to arise and the court in this case adheres to the rule laid down *supra.*

In the case of *Shelton* vs. *Haxtun*, 91 N. Y., *supra*, the New York Court of Appeals laid down the same rule. The question there was a question of usury and turned upon whether the contract was made in New York or Illinois. Earl, J., writing the prevailing opinion of this court, says, at page 131:

> "The note was executed in Illinois at the place of defendant's residence, and expressed no place of payment, and was forwarded to the plaintiff in this state by mail. There was no evidence tending to show that there was any intention on the part of either of the parties to evade the usury laws of this state, and the note was manifestly executed with reference to the laws of the State of Illinois, where the maker resided, and where the laws authorized the rate of interest inserted in the note. The note was given in Illinois in exchange for a note there surrendered through the agency of the mail by the plaintiff to the defendant; and *when in pursuance of plaintiff's request this note was executed by the defendant and put in the mail, directed to him at his residence in this state, the contract between the parties was complete*, and the note then became the property of the plaintiff. If it had been lost in the mails it would have been lost as the property of the plaintiff, and he could, therefore, have sued the defendant thereon as upon a lost note. If it had been stolen from the mails, or unlawfully taken or converted, it could have been described in an indictment for the crime as the property of the plaintiff, or could have been recovered by him in an action of replevin, or sued for in an action of trover, claiming it as his property."

If Meyer had died after the acceptance of his application by the plaintiff in error in Chicago, Illinois, and before the

certificate sued on had been received by him in New York, his beneficiary could have unquestionably maintained an action upon the contract evidenced by the certificate.

Thus the New York Court of Appeals has laid down the rule that the place where the last essential act takes place, which act causes the liability upon the contract to arise, is the place, with reference to the law of which the contract is made, and by whose laws the contract is governed. The doctrine of this case, laid down by that court, makes the contract at bar, not a New York, but an Illinois contract, and with reference to the law of which latter jurisdiction, that contract was made.

In *McIntyre* vs. *Parks*, 3 Metc. (*supra*), it was held by the Supreme Court of Judicature of the Commonwealth of Massachusetts that where a proposal to purchase goods is made by a letter sent to another state and is there assented to, the contract of sale is made in the latter and not in the former state.

This is the rule for which we are contending in the case at bar.

And in *Milliken* vs. *Pratt*, 125 Mass. (*supra*), the same court held that a contract of guaranty signed in that commonwealth and sent by mail to another state, and *assented to and acted on, there*, for the price of goods sold there, *is made in the latter state.*

To the same effect:

Gay vs. *Rainey*, 89 Ill., 221.

Buchanan vs. *Drovers' Nat. Bank of Chicago*, 55 Fed. Rep., 223.

Western T. & C. Co. vs. *Kilderhouse*, 87 N. Y., 430.

Merchant vs. *Chapman*, 4 Allen, 362.

Sands vs. *Smith*, 1 Neb., 108.

Hosford vs. *Nichols*, 1 Paige's Ch., 220.

In *Bascom* vs. *Zediker* (*supra*), the court said, at pages 385-386:

> "A contract is made when it is finished, completed, consummated. In the case at bar the loan of Bascom to Zediker was not completed until the money was paid over to him by the cashier of the First National Bank at Franklin. By agreement between the parties Bascom was to remit, and did remit, the money to the cashier of the First National Bank of Franklin. He was to pay over the money to Zediker on the latter's delivery to him for Bascom certain of the capital stock of the bank. The contract, then, between Bascom and Zediker was consummated in Franklin, Nebraska, when the $10,000 of stock was delivered to the cashier and $9,900 money paid over by him to Zediker. The decree of the District Court is right and is affirmed."

Armstrong, et al., vs. *Best*, 112 N. C. (*supra*), was a case in which the question was as to the disability of a married woman to make a contract, and the court said it was well settled that if the contract had been made in the State of North Carolina her common-law disability would make it void. The plaintiffs insisted that the contract was made in Baltimore, Md., and quoted *Milliken* vs. *Pratt* (*supra*), and *Pattison* vs. *Mills*, 1 Dow. & Cl., 342, in which Lord LYNDHURST laid down the law as follows:

> "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."

The court in the Armstrong case follows the rule that the last essential act determines the place of and the law governing the contract, but held that the ability to sue and be sued depended upon domicile and affirmed a judgment holding that the plaintiffs were not entitled to recover upon that ground.

In *Waldron* vs. *Ritchings*, 9 Abb. Pr. N. S. (*supra*), the court held, at page 367:

> "When negotiations for a contract are carried on between two parties living in different states, as in this case, partly by the interchange of letters and partly by the oral communications of an agent of one of the parties, the contract is made in the state or place where it first took effect so as to become of binding obligation upon both parties."

In the case at bar the contract took effect upon the acceptance of the application by the executive authority of the plaintiff in error, to-wit, its board of control, and, on this record, that is shown to have been at Chicago, Illinois.

We are irresistibly led to the conclusion, therefore, that the contract at bar is an Illinois contract, that it is made with reference to the laws of that state, and that

(*a*) The evidence rejected at the trial is admissible without the waiver and

(*b*) The waiver is entirely effective and the exceptions to its rejection must be sustained, the judgment reversed and a new trial ordered.

And where (as in the case at bar) a proposal is made by a person residing in the State of New York, to a corporation having its residence in the State of Illinois, and is in Illinois accepted, the *place of acceptance* and not the place of proposal *is the place of the contract.* The contract is deemed, in law, to be made at the latter place, with a view to the incorporation therein of that (*i. e.*, the Illinois) law, and is in all respects and for all purposes an Illinois contract.

Farmers', etc., Sav. Co. vs. *Bazore*, 67 Arks., 252.

Zeltner vs. *Irwin*, 25 App. Div., 228.

Milliken vs. *Pratt*, 125 Mass., 374 (*supra*).
Baum vs. *Birchall*, 150 Pa. St., 164.

And where, by the terms of the offer, it is not to become a contract until accepted, the place of acceptance is the place of the contract. This is elementary and results from the fundamental nature of every contract.

And it will be presumed that the contract is to be performed at the place where it is made (*i. e.* Chicago, Illinois), and is to be governed by the law of Illinois, unless there is something in the *terms* of the contract, or in the explanatory circumstances of its execution inconsistent with that intention. This has been held by a long line of eminent authorities.

Toledo First Nat. Bank vs. *Shaw*, 61 N. Y., 294.
Liverpool, etc.. Steam Co. vs. *Phenix Ins. Co.*, 129 U. S., 448.
Pritchard vs. *Norton*, 106 U. S., 124.
Lloyd vs. *Guibert*, L. R. Q. B., 115.
Lewis vs. *Headley*, 36 Ill., 433.
Smith vs. *Mead*, 3 Conn., 353.
DeSobry vs. *De Laistre*, 3 Am. Dec., 535.
Tillinghast vs. *Boston, etc., Lumber Co.*, 39 S. C., 484.
Fisher vs. *Otis*. 3 Pin. (Wis.), 78.
Hilliard vs. *Outlaw*, 92 N. C., 266.
Kittle vs. *Delamater*, 3 Neb., 325.
Young vs. *Harris*, 14 B. Mon. (Ky.), 447.
Hyatt vs. *State Bank*, 8 Bush., 193.
Philadelphia Loan Co. vs. *Towner*, 13 Conn., 357.

(*a*) There is nothing in the terms of the contract providing for performance at any other place than the home

office of the defendant in the City of Chicago, in the County of Cook, in the State of Illinois.

Application (Rec., fols. 152-163).

Benefit Certificate (Rec., fols. 145-150).

Moreover, in the nature of the contract, there could be no specified place of performance if performance be deemed to be the delivery of the money due under the obligation at maturity, and the acceptance of the surrendered certificate, for then the place wheresoever upon this earth the beneficiary, at the time of maturity, might be, would have to be the place of performance.

As it is impossible for the parties to know or contemplate where that place might be, it is impossible from this point of view to say at the inception of the contract that there is any specific or particular place of performance, or that any particular or specific place was in the contemplation of the parties.

If, on the other hand, and this is the only reasonable and possible construction of the terms of the contract, *performance is accomplished when the plaintiff in error accepts, as satisfactory, the proofs of death*, acknowledges the performance of the conditions, and sends to the beneficiary, wheresoever the beneficiary may be found, *from out its home office in the City of Chicago, in the State of Illinois, the covenanted sum, then the place of performance* by the terms of the contract, by its only possible interpretation *is within the jurisdiction of the State of Illinois.*

We, therefore, respectfully urge that this contract, which arose in Illinois, was to be performed in Illinois, and we are unaware of any decision in the law, whether of the State of New York or any other state of the United States, whether by the Federal Courts or the courts of the mother of the common law, or under the civil law, or under the decisions

rendered under any system of law which has ever obtained among civilized people, under which this contract can be held or deemed to be anything else than *an Illinois contract.*

(*b*) Not only are there no explanatory circumstances in the execution of the contract, inconsistent with the intention to make the place of performance the place of acceptance, but there are good and controlling reasons inherent in the nature of the plaintiff in error's organization and the beneficent work it is doing, in furnishing cheap insurance to those otherwise unable to obtain any protection, and in the contract at bar, which make it definite and certain that the place of performance is the place of origin and *the law with regard to which the contract was made*, the law of the home office of the defendant, *the law of the State of Illinois.*

The plaintiff in error insures its members *in all of the states* of the American Union, in each of its territories and the District of Columbia, in each of the provinces of Canada, in British Columbia, in Mexico, in Cuba and in the Hawaiian Islands.

Were the law applicable to the construction of the contract to be *lex fori*, there would be as many kinds of contracts between each member and his fellow members as there are jurisdictions where their beneficiaries chose to sue. If this court shall declare the law in favor of the defendant in error, it will only be necessary for claimants living in Illinois and other jurisdictions, which are not complaisant to the violators of their solemn contractual obligations to society and other moral perverts, to assign their claims to residents of the State of New York, and use the courts thereof to work injustice upon their fellow members.

Yet justice, equity and fair dealing to all require that all these contracts should be construed alike, by means of the

same body of law, under uniform principles of construction and subject to the same rules of interpretation and evidence. The interests of justice and equity require that they shall all be deemed as made in view of one body of law (not that the wildest conflict shall exist, so that a clause enforced in one jurisdiction shall be nullified in another, and there be no common rights, duties or obligations). It is with a view to this necessity that the defendant closes all of its contracts in the one place—Chicago—and they are all made with reference to one law—that of Illinois.

These contracts rest on like obligations. The rates are the same to all. Should it have to pay in suicide cases more than the stipulated amount in New York, and only the covenanted sum in Illinois, the burdens are unequally placed and equity has not been done.

The interpretation of the contract, and of the rights and obligations of the parties thereto, are regulated by the law prevailing at the place of performance, and how much more is this true when the place of performance is the place of execution.

St. Nicholas Bank vs. *State Nat. Bank*, 128 N. Y., 26.

Jewell vs. *Wright*, 30 N. Y., 259.

Dickinson vs. *Edwards*, 58 How. Pr., 24.

Scudder vs. *Union Nat. Bank*, 91 U. S., 406.

Cox vs. *U. S.*, 6 Pet., 172.

Morris vs. *East Side Car Co.*, 104 Fed. Rep., 409.

Sandham vs. *Grounds*, 94 Fed. Rep., 83.

Martin vs. *Roberts*, 36 Fed. Rep., 217.

Don. vs. *Lippmann*, 5 Cl. & F., 1.

Ferguson vs. *Fyffe*, 8 Cl. & F., 121.

Shoe, etc., Nat. Nank vs. *Wood*, 142 Mass., 563.

Akers vs. *Demond*, 103 Mass., 323.

Brown vs. *Camden, etc., R. Co.*, 83 Pa. St., 316.
Waverly First Nat. Bank vs. *Hall*, 150 Pa. St., 466.
Baum vs. *Birchall, supra.*
Fitzsimons vs. *Guanahani Co.*, 16 S. C., 192.
Robinson vs. *Queen*, 87 Tenn., 445.
Cartwright vs. *New York, etc., R. Co.*, 59 Vt., 675.
Hanrick vs. *Andrews*, 9 Port (Ala.), 9.
Belmont vs. *Cornen*, 48 Conn., 342.
Vermont State Bank vs. *Porter*, 5 Day (Conn.), 322.
Herschfeld vs. *Dexel*, 12 Ga., 582.
Greenwald vs. *Freese*, 34 Pac. Rep., 73.
Lewis vs. *Headley, supra.*
Guignon vs. *Union Trust Co.*, 156 Ill., 135.
Lowy vs. *Andrews*, 20 Ill. App., 521.
Abt vs. *American Trust, etc., Bank*, 159 Ill., 467.
People's Bldg. Co., etc., Assn., vs. *Fowble*, 17 Utah, 122.
Stevens vs. *Gregg*, 89 Ky., 461.
Boyd vs. *Ellis*, 11 Ia., 97.
Arnold vs. *Potter*, 22 Ia., 194.
Alexandria, etc.. R. R. Co. vs. *Johnson*, 61 Kan., 417.
Capryn vs. *Adams*, 28 Md., 529.
Marburg vs. *Marburg*, 26 Md., 8.
Jordan vs. *Fitz*, 63 N. H., 227.
Whitney vs. *Whiting*, 35 N. H., 462.
Thayer vs. *Elliott*, 16 N. H., 102.
Dyer vs. *Hunt*, 5 N. H., 401.
Knox vs. *Gerhausen*, 3 Mont., 275.
Shacklett vs. *Polk*, 51 Miss., 378.

Hart vs. *Livermore Foundry, etc., Co.*, 72 Miss., 809.

Reg. vs. *Ogilvie*, 6 Can. Exch., 21.

As, in the case a bar, the last essential act to complete the contract was the acceptance of the application, and, as this was done, and could only be done by the terms of the offer contained in the application, by the board of control, at Chicago, Illinois, it is in that place, under all the authorities, that the contract arose. The conclusion is irresistible that this is an Illinois contract, made with reference to the laws of Illinois, and to be by them construed.

The essential vice of the argument contained in the opinion of Mr. Justice GRAY and concurred in by the entire Court of Appeals of New York, in determining this case is that it utterly ignores the terms of the offer upon which the contract in suit was based.

The application provided for the acceptance in Chicago of the offer therein contained. The offer was accepted in Chicago, as appears by the language of the benefit certificate. The instruments speak for themselves.

Nothing then remained to be done.

Forty acceptances might be endorsed upon the benefit certificate and they could not have any effect to change the very elementary proposition of law that *the acceptance of an offer in the terms in which it is made* between parties capable of contracting, with regard to subject-matter capable of being contracted about, where consideration exists, *consummates a contract* and fixes the contractual rights and liabilities of the parties.

The Effect of these Decisions on the Case at Bar.

It has never been doubted that an executory (bilateral) contract (when there is a contract as in the case at bar) is within the protection of the non-impairment clause.

15 Ency. of Law, 2d Ed., 1033.

The contract was supported, as was each part of it, and especially the clause in question here, by ample consideration. It is therefore within the federal constitution's protection.

Idem, 1039, note 8.

It will be asked: What is the obligation which the plaintiff in error claims the statute (section 834, Code of Civil Procedure of the State of New York) impairs?

The following authorities will define this:

Sturges vs. *Crowninshield*, 4 Wheaton, 197.
McCracken vs. *Hayward*, 2 How., 608.

In the very early case of *Sturges* vs. *Crowninshield*, *supra*, MARSHALL, C. J., thus defines it:

> "A contract is an agreement in which a party agrees "to do or not to do a particular thing. The law binds "him to perform his obligation, and this is, of course, "the obligation of his contract."

And in *McCracken* vs. *Hayward*, 2 How., 608, BALDWIN, J., speaking for the court, said:

> "The obligation of a contract consists of its binding "force on the party who makes it. This depends on "the laws in existence when it was made. These are "necessarily referred to in all contracts, and form a "part of them, as the measure of the obligation to per- "form them by the one party and the right acquired "by the other."

But what law can here be referred to, or possibly meant, but the law of the place where the contract had its inception and within whose jurisdiction it took its birth? We have shown that jurisdiction to be the State of Illinois. We will refer to the decisions there on the questions at issue, and to the common law of this state as evidence of it.

In the case last cited Mr. Justice BALDWIN further says:

> "If any subsequent law (by which the court must "necessarily mean any law substantially enacted or in- "jected in any way therein) affect to diminish the duty "or impair the right it necessarily bears on the obliga- "tion of the contract in favor of one party to the injury " of the other; hence any law which in its operation "amounts to a denial or obstruction of the rights accru- "ing by a contract, though professing to act only on "the remedy, is directly obnoxious to the prohibition of "the constitution."

What, then, becomes of section 834 of the Code of Civil Procedure of this state when attempted to be injected into an Illinois contract, and what of section 836 purporting to deny validity to the waiver contained in said contract if valid under the *lex loci celebrationis?*

Calling this a statute of remedy and not of right does not change the matter, nor benefit the defendant in error, for it is in its essence the denial of a substantial right of the plaintiff in error under, pursuant to, of the substance and of the essence of the contract in question; the right of the plaintiff in error to enforce, and the obligation of the defendant in error to permit the testimony of the physicians, and particularly of Dr. Bruso, erroneously excluded upon the trial.

This is an Illinois contract, for it arose in, was made in, and absolutely completed in, Illinois. The certificate was made, signed and sealed in Illinois (Rec., fol. 149), and that

this contract *should be made in* Illinois is one of the terms of the offer made by Emanuel Meyer to the plaintiff in error to accept him as a member of its endowment rank and enter with him into the contract now in suit (Rec., fol. 161). The issuance of the certificate is the necessary and sufficient evidence of the acceptance of the application—is the last act to be done in the making of the contract. This document pleaded by and introduced in evidence by the defendant in error, speaks for itself, and proclaims the transmutation of the offer contained in the application into the contract arising by its acceptance, to have taken place at the City of Chicago, in the State of Illinois.

It having been shown that this is an Illinois contract, the next question to which we respectfully direct the attention of the court is, what was the law of Illinois at the time of the making of the contract at bar? There are two sources from which this court may discover the same:

(*a.*) It may test the question by an examination of the Illinois decisions upon this question or

(*b.*) Assume the common law of Illinois to be the same as the common law of New York, and examine the question in the light of that law, in accordance with the well settled rule.

It will be found that, tried by either test, the evidence excluded was admissible under the contract, and its exclusion over the plaintiff in error's exceptions requires the reversal of the judgment complained of.

Waldron vs. *Ritchings*, 9 Abb. Pr. N. S., 359.
White vs. *Delafield*, 23 Barb., 498.

Communications from a patient to his physician were not privileged at common law.

23 Ency. of Law, 83,

and the following authorities grouped under their several jurisdictions hold that proposition to be true:

NEW YORK.

Edington vs. *Aetna Life Ins. Co.*, 77 N. Y., 564.
People vs. *Stout*, 3 Park, Crim. Rep., 670.
Kendall vs. *Grey*, 2 Hilton, 300.

ENGLAND.

Rex vs. *Gibbons*, 1 C. & P., 97.
Brown vs. *Carter*, 9 L. C. Jur., 163.
Kingston's Case, 20 How. State Trials, 572.
Broad vs. *Pitt*, 3 C. & P., 518.
Wheeler vs. *LeMarchant*, 17 Ch. D., 675.

CONNECTICUT.

Goddard vs. *Gardner*, 28 Conn., 172.

INDIANA.

Springer vs. *Byram*, 137 Indiana, 15.

IOWA.

Winters vs. *Winters*, 102 Iowa, 53.

MASSACHUSETTS.

Barnes vs. *Harris*, 7 Cush., 577.

MICHIGAN.

Campau vs. *North*, 39 Mich., 606.

MONTANA.

Territory vs. *Corbett*, 3 Montana, 50.

TEXAS.

Steagald vs. *State*, 22 Tex. App., 464.

WISCONSIN.

Boyle vs. *N. W. Mut. Relief Assn.* ,95 Wis., 312;
In re Bruendl, 102 Wis., 45;

and while it is true that statutes have been enacted in some jurisdictions forbidding the disclosure of evidence, against the will of the patient, of information acquired by physicians in their professional capacity, those statutes can only be construed as part of and read into contracts made within the territorial jurisdiction where those statutes are enacted.

As far as the plaintiff in error has been able to learn by an examination of the statutes of the various jurisdictions which administer the common law and take their jurisprudential system from the fountain head of the common law are the following in this country:

California,
Colorado,
Indiana,
Iowa,
Kansas,
Michigan,
Missouri,
Montana,
New York,
Pennsylvania,
Wisconsin,

in which there are statutes which affect the admissibility as evidence of communications made to a physician.

Certain it is, however, that an exhaustive search of the statutes of the State of Illinois, where this contract was made, reveals no statutory prohibition or even regulation concerning the testimony or other evidence of physicians or surgeons in cases of the kind at bar.

The common law obtains in that jurisdiction as it existed in England prior to the fourth year of James the First, and it is, therefore, respectfully urged that the evidence ruled out against the plaintiff in error's exceptions was admissible, entitled it to a verdict in its favor, at the hands of the jury, and that the judgment must be reversed for the aforesaid errors.

There is not a single decision nor even an expression *obiter* by any court sitting within the boundaries of the State of Illinois, high or low, of record or not of record, of first resort or last resort, or of intermedate appellate jurisdiction, which has in any way, shape or form at any time from the admission of Illinois as a state within this Union to the present day, ruled out the material and relevant evidence of any physician, surgeon or other medical man in any kind of case or proceeding as incompetent.

The law of Illinois is, therefore, that the evidence is admissible.

By the common law the evidence was admissible and if we are to test that common law by the common law of the State of New York, we have already shown that fact by the decisions *supra*. If it is to be tested by the decisions of the courts of Illinois and the statute law of that state, then we respectfully urge that an entire absence of statutory prohibition or regulation accompanied by as equally an absolute silence on the part of its courts, *leads to the irresistible conclusion that the evidence is admissible by the law of the State of Illinois.*

"We are irresistibly led to the conclusion, therefore, that the contract at bar is an Illinois contract, that it is made with reference to the laws of that state, and that

"(*a*) The evidence rejected at the trial is admissible without the waiver, and

"(*b*) The waiver is entirely effective, and the exceptions to its rejection must be sustained, the judgment reversed and a new trial ordered."

In the absence of proof to the contrary, the common law will be presumed to be in force in a sister state, unless there is evidence in the record to the contrary.

It is the general rule throughout the United States that, in the absence of proof as to the laws of a sister state, it will be presumed that the common law exists there, and according to the weight of authority, no presumption arises that other countries or states have adopted any of the statute laws of the domestic forum.

Davis vs. *Garr*, 6 N. Y., 124.

White vs. *Knapp*, 47 Barb., 549.

Throop vs. *Hatch*, 3 Abb., Pr., 23.

Wright vs. *Delafield*, 23 Barb., 198.

Leonard vs. *Columbia Steam Nav. Co.*, 84 N. Y., 48.

McDonald vs. *Mallory*, 77 N. Y., 547.

Crowley vs. *Panama R. R. Co.*, 30 Barb., 90.

Beach vs. *Bay State Steamboat Co.*, 30 Barb., 433.

Van Deventer vs. *N. Y., etc. R. R. Co.*, 27 Barb., 244.

Whitford vs. *Panama R. R. Co.*, 23 N. Y., 465.

McCulloh vs. *Norwood*, 58 N. Y., 567.

Dunn vs. *Adams*, 1 Ala., 527.

Atchison etc., R. R. Co. vs. *Betts*, 10 Col., 431.

Langdon vs. *Young*, 33 Vt., 136.

Murphy vs. *Collins*, 121 Mass., 6.

Kelley vs. *Kelley*, 161 Mass., 111.

Hull vs. *Augustine*, 23 Wis., 383.

Flato vs. *Mulhall*, 72 Mo., 522.

Davis vs. *Bowling*, 19 Mo., 651.

Crouch vs. *Louisville, etc., R. R. Co.*, 42 Mo. App., 248.

Morrisey vs. *Wiggins Ferry Co.*, 47 Mo., 521.

Stout vs. *Wood*, 1 Blackf., 71.

Carpenter vs. *Grand Trunk R. R. Co.*, 72 Me., 388.

Ellis vs. *Maxson*, 19 Mich., 186.

Kermo vs. *Ayer*, 11 Mich., 181.

People vs. *Lambert*, 5 Mich., 349.

The case of *Stout* vs. *Wood* (*supra*), was an action for slander, based upon words which are actionable under the statute law of the forum, but not at common law, and which were spoken in another state. It was held in this case that the action could not be maintained without proof of a statute of the state where the words were spoken, making them actionable "because," says the court, "There "is no presumption that the statute law of the state where "the words were spoken is the same as that of the forum."

To the same effect is *Langdon* vs. *Young* (*supra*), and *Leonard* vs. *Columbia Steam Nav. Co.* (*supra*), in which latter case MILLER, J., writing the opinion, says, at page 52:

> " * * * The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state but

in a foreign country unless it is proved that the laws of the country are of a similar character. (Citing cases, *supra.*)"

In *Waldron* vs. *Ritchings*, 9 Abb. Pr., N. S., 369, *supra*, it was held that a married woman's legal incapacity *is presumed* to be the same in another state as it was in New York, *prior to the enabling statutes.*

Three very instructive decisions by the Supreme Court of Michigan, are:

Kling vs. *Fries*, 33 Mich., 275.
Roethke vs. *Phillip Best Brewing Co.*, *ibid.*, 340.
Webber vs. *Donnelly*, *ibid.*, 469.

In these cases it was held that as against the validity of a contract it will not be presumed that the statutes of another state are, like those of the forum, in derogation of the common law.

In the absence of proof, the presumption always is that the common law exists in sister states, taking their origin either

(*a.*) As colonies of the British Empire, or

(*b.*) Those states settled by the citizens of such colonies or organized out of their territory.

This court will take judicial notice of the historic fact that Illinois was carved out of the Northwest territory, belonging to the State of Virginia; and of the further historic fact that Virginia was a royal colony which had adopted the common law, and that, therefore, the common law exists (as it does in point of fact) in the daughter of Virginia, *i. e.*, the State of Illinois. This doctrine has been held not alone in the State of New York and in the Federal courts, but in a number of states of the Union.

We cite the cases under the several jurisdictions in which they were decided:

NEW YORK.

Vanderpoel vs. *Gorman*, 140 N. Y., 563.
Whitford vs. *Panama R. R. Co.*, *supra*.
Harris vs. *White*, 81 N. Y., 544.
Seymour vs. *Sturgess*, 26 N. Y., 134.
Starr vs. *Peck*, 1 Hill, 270.
Abell vs. *Douglass*, 4 Den., 305.
White vs. *Knapp*, *supra*.
Throop vs. *Hatch*, *supra*.
Savage vs. *O'Neil*, 42 Barb., 374.
Wright vs. *Delafield*, *supra*.

UNITED STATES.

Pyeatt vs. *Powell*, 51 Fed. Rep., 551.

ILLINOIS.

Merritt vs. *Merritt*, 20 Ill., 65.
Lipe vs. *McClevy*, 41 Ill. App., 59.
Miller vs. *MacVeagh*, 40 Ill. App., 552.
Van Ingen vs. *Brabrook*, 27 Ill. App., 401.
Hanchett vs. *Rice*, 22 Ill. App., 442.

ALABAMA.

Peet vs. *Hatcher*, 112 Ala., 514.
Alabama G. S. R. Co. vs. *Carroll*, 97 Ala., 126.
Bangs vs. *Edwards*, 88 Ala., 382.
Castleman vs. *Jeffries*, 60 Ala., 31.
McAnnally vs. *O'Neal*, 56 Ala., 299.
McDougald vs. *Carey*, 38 Ala., 320.
Connor vs. *Trawick*, 37 Ala., 289.
Woodward vs. *Donally*, 27 Ala., 198.

Reese vs. *Harris*, 27 Ala., 301.
Cockrell vs. *Curley*, 26 Ala., 405.
Marshall vs. *Betner*, 17 Ala., 836.
Averett vs. *Thompson*, 15 Ala., 678.
Ellis vs. *White*, 25 Ala., 540.
Shepherd vs. *Nabors*, 6 Ala., 631.
Goodman vs. *Griffin*, 3 Stew., 160.
Dunn vs. *Adams*, 1 Ala., 527.

ARKANSAS.

Thorn vs. *Weatherly*, 50 Ark., 237.
Hydrick vs. *Burke*, 30 Ark., 124.
Newton vs. *Cock*, 10 Ark., 169.

CALIFORNIA.

Cavender vs. *Guild*, 4 Cal., 253.
Thompson vs. *Monroe*, 2 Cal., 99.

GEORGIA.

Patillo vs. *Alexander*, 96 Ga., 60.

INDIANA.

Jackson vs. *Pittsburgh, etc., R. Co.*, 140 Ind., 241.
Robards vs. *Marley*, 80 Ind., 185.
Paterson vs. *Carrell*, 60 Ind., 128.
Smith vs. *Peterson*, 63 Ind., 243.
Smith vs. *Muncie Nat. Bank*, 29 Ind., 158.
Schurman vs. *Marley*, 29 Ind., 458.
Alford vs. *Baker*, 53 Ind., 279.
Mendenhall vs. *Gately*, 18 Ind., 149.
Crake vs. *Crake*, 18 Ind., 156.
Buckinghouse vs. *Gregg*, 19 Ind., 401.
Johnson vs. *Chambers*, 12 Ind., 112.
Titus vs. *Scantling*, 4 Blakcf., 89.
Trimble vs. *Trimble*, 2 Ind., 76.

IOWA.

Hudson vs. *N. P. R. R. Co.*, 92 Iowa, 231.
Holmes vs. *Mallett*, 1 Morr., 82.

KENTUCKY.

Miles vs. *Collins*, 1 Met., 308.

MASSACHUSETTS.

Commonwealth vs. *Graham*, 157 Mass., 73.
Ufford vs. *Spaulding*, 156 Mass, 65.
Thurston vs. *Percival*, 1 Pick., 415.

MICHIGAN.

Roethke vs. *Philip Best Brewing Co.*, *supra.*
Hutchins vs. *Kimmell*, 31 Mich., 133.
Ellis vs. *Maxson*, *supra.*

MINNESOTA.

Mohn vs. *Meisen*, 47 Minn., 228.

MISSOURI.

Burdict vs. *M. P. R. R. Co.*, 123 Mo., 221.
Benne vs. *Schnecko*, 100 Mo., 250.
State vs. *Clay*, 100 Mo., 571.
Meyer vs. *McCabe*, 73 Mo., 236.
Morrisey vs. *Wiggins Ferry Co.*, *supra.*
Lucas vs. *Ladew*, 28 Mo., 342.
Am. Oak Leather Co. vs. *Wyeth Hardware etc., Co.*, 57 Mo. App., 287.
Kratz vs. *Preston*, 52 Mo. App., 251.
Roll vs. *St. Louis, etc,, Smelting, etc., Co.*, 52 Mo. App., 60.

OREGON.

Cressey vs. *Tatom*, 9 Ore., 545.

PENNSYLVANIA.

Brown vs. *Camden, etc., R. R. Co.*, 83 Pa. St., 316.

TEXAS.

Mexican Cent. R. R. Co. vs. *Mitten*, 13 Tex. Civ. App., 653.

The case of *Roll* vs. *St. Louis, etc., Co.*, 52 Mo. App., 60 (*supra*) holds that *the common law is presumed to be in force in the State of Illinois in the absence of proof to the contrary.*

The case of *Kratz* vs. *Preston*, 52 Mo. App., (*supra*), held that in the absence of proof to the contrary, the common law was presumed to be in force in the Commonwealth of Pennsylvania, and in the case of *Am. Oak Leather Co.* vs. *Wyeth, etc., Co.*, 57 Mo. App., (*supra*), the court held that the common law is, in absence of proof to the contrary, presumed to be in force in the State of Michigan.

In the case of *Harris et al.* vs. *White* (81 N. Y., *supra*), FOLGER, Ch. J., writing the unanimous opinion of the court says, at page 544:

> "* * * *If the common law prevails in the other state* in which by contract the plaintiffs agreed to drive the defendant's horses, then that contract was not illegal by the law of those states, and *the statute law of this state may not run over its borders into those states and with it carry thither the public policy of this state.* The defendant has made no proof of what is the law of those states on this subject; he has not even pleaded that by that law this contract was illegal (*Cutler* vs. *Wright*, 22 N. Y., 472). As a general rule courts of one state, in the absence of proof and allegations otherwise, will presume that the laws of another state are like those of their own state. It is doubted, however, whether this presumption will be made of statute law

(*McCulloch* vs. *Norwood*, 58 N. Y., 567; *Wilcox Co.* vs. *Green*, 72 *id.*, 17). It will not be made of statutes imposing a penalty or forfeiture. And it has been declared that a court can not take notice judicially of any laws of other states not according to the common law (*Holmes* vs. *Broughton*, 10 Wend., 75)."

Applying this case to the case at bar, is it not clear beyond controversy that this Honorable court will presume the law of Illinois in the absence of proof to be what the common law of New York was with respect to the Illinois contract in suit before the statute changed the common law? And will not this Honorable court out of its abundant learning, judicially know what that common law is, that the evidence in this case excluded over the plaintiff in error's exceptions,upon the objection of the defendant in error was admissible and its exclusion by the learned trial court highly prejudicial to the plaintiff in error and reversible error?

In the case of *Whitford* vs. *The Panama R. R. Co.*, 23 N. Y. (*supra*), DENIO, J., said at page 468:

"* * * *And where the condition of a law of another state becomes material, and no evidence has been offered concerning it, our courts will presume that the general principles of the common law, which we always consider to be consonant to reason and natural justice, prevail there. But no such presumption obtains respecting the positive statute law of the state. There is generally no probability, in point of fact, and there is never any presumption of law that other states or countries have established, precisely or substantialty, the same arbitrary rules which the domestic legislature has seen fit to enact.*"

In the case of *Starr* vs. *Peck*, 1 Hill (*supra*), the court, by COWEN, J., said, at page 272:

"But it is true that the parties had power to contract marriage *inter se* before the husband went to sea without the intervention of a clergyman (*Fenton* vs. *Reed*, 4 John Rep., 52). *Such is the common law, which we must presume was the law of Connecticut at the time in the absence of proof to the contrary.*"

In *Seymour* vs. *Sturgess*, 26 N. Y., 134, ALLEN J., writing the opinion of the court, says at page 139:

"* * * We have so much of the charter as the plaintiff has seen fit to set out in his complaint, and in it there is nothing to charge the stockholders, and the charter itself was not put in evidence, nor any general law of the state of Maryland *upon any subject. The common law, therefore, must determine the liability of the parties* (*Holmes* vs. *Boughton*, 10 Wend., 75; *Thorp* vs. *Hatch*, 3 Abb. Pr., 23; 1 Kent Com., 472)."

In *Vanderpoel* vs. *Gorman*, as sheriff, etc. (140 N. Y., 563; *supra*), which was an action brought by plaintiff as substituted assignee for the benefit of the creditors of the North River Lumber Company to recover from the defendant the value of certain property, levied on by him as sheriff of the County of New York, by virtue of certain attachments against the corporation. PECKHAM, J., writing the opinion of the court, said, at page 568:

"There can be no doubt that an insolvent corporation could at common law make a general assignment in trust to an assignee for the benefit of its creditors (*Haxtun* vs. *Bishop*, 3 Wend., 13; *DePuyster* vs. *Trustees of St. Peter's Church*, 3 Barb. Ch., 119, 124; s. c. on appeal, 3 N. Y., 238; 2 Mor. on Corp., §802 and note). Under the law of New Jersey, in which state the corporation was created, its right to make an assignment of this nature seems to be established (*Wilkinson* vs. *Bauerle*, 41 N. J., Eq., 635). *At any*

rate no statute of New Jersey prohibiting such an assignment was proved by defendant, and we can not presume that the common law has been altered in New Jersey upon this subject without some proof to that effect."

Upon the authorities selected from the great number we have cited, there is absolutely no question but what the absence of proof of the *lex loci celebrationis* requires that we should apply the presumption well nigh universal in the mother country and this, and exercised by the Honorable Court of Appeals of New York repeatedly, *that the law governing the contract is the common law and that the evidence in question was admissible.*

Moreover, the very absence of statutory regulation or prohibition in the State of Illinois and the very silence of its courts upon the main issue leaves to the defendant in error the burden and duty of showing, if she can, what it is respectfully urged she can not do, that under the *lex loci celebrationis* the evidence was not admissible. She has neither sustained nor attempted to sustain that burden.

He who seeks to vary the foregoing rule has the burden of proving the variance. In this the defendant in error utterly failed. No scintilla of evidence was offered upon the trial to show that the waiver in question was prohibited, made ineffective, or was insufficient under the law which governed the contract and with reference to which the same was made.

AND FOR THE VERY BEST REASON POSSIBLE. THERE WAS NO SCINTILLA OF EVIDENCE OFFERED BY THE DEFENDANT IN ERROR UPON THE TRIAL IN DEROGATION OF THE COMMON LAW IN ILLINOIS, BECAUSE NONE SUCH, IN FACT, EXISTS.

POINT THREE.

A Federal question having been made and this cause being properly in this court under the writ of error allowed herein, the entire record is to be examined, and if reversible error has been committed, the judgment must be reversed.

Burton vs. *United States*, October, 1904, Term, 343, decided January 16, 1905.

Horner vs. *United States*, 140 U. S., 570, at 576, 577.

See same, 36 L. Ed., 266.

See same, 12 Sup. Ct. Rep., 522.

Act of March 3, 1891, Sec. 5, U. S. R. S., Sec. 709.

In the case of *Joseph Ralph Burton, plaintiff in error*, vs. *United States, supra*, the plaintiff in error having been convicted in the District Court of the United States for the Eastern District of Missouri, of a violation of the Revised Statutes of the United States, section 1782, brought his case directly to the Supreme Court from that court upon a writ of error. A number of errors were assigned by Senator Burton in the proceedings below, and Mr. Justice PECKHAM, delivering the opinion of this Honorable court, said:

"Counsel for the defendant base their right to ob-
"tain a direct review by this court of the judgment of
"conviction in the District Court of Missouri upon the
"contention that the case involves the construction and
"applicatian of the Constitution of the United States in
"several particulars. They insist that under Article 3,
"Sec. 2 of the Constitution, and also under the 6th
"Amendment of the same, the defendant was entitled
"to be tried by a jury of the state or district in which

"the crime alleged against him in the indictment was "committed. This question arises by reason of those "counts of the indictment which charge the receipt by "defendant of various checks therin set forth, at St. "Louis, in the State of Missouri, while the evidence in "the case shows, without contradiction, that the checks "were received in the City of Washington, D, C., and "payment thereof made to defendant by one of the "banks of that city. Counsel contended that if any "crime were committed by the receipt of these checks "and the payment thereof to the defendant [which is "denied], that crime was committed in Washington, "and not in Missouri, and that it did not come within "Sec. 731 of the Revised Statutes of the United States "(U. S. Comp. Stat., 1901, p. 585), providing that "when an offense against the United States is begun "in one judicial circuit, and completed in another, it "shall be deemed to have been committed in either, "and may be dealt with, etc., in either district, in the "same manner as if it had been actually and wholly "committed therein. Counsel for defendant also contend "that the case involves the construction and application "of Sec. 6 of Article 1 of the Constitution of the United "States, providing that senators and representatives "shall, in all cases except treason, felony and breach of "the peace, be privileged from arrest during their at- "tendance at the sessions of their respective houses, "and in going to and returning from the same. These "questions were raised in the court below. Whether "the defendant waived his alleged privilege of freedom "from arrest as senator would probably depend upon "the question whether the offense charged in substance "a felony, and if so, was that privilege a personal one "only, and not given for the purpose of always secur- "ing the representation of a state in the senate of the "United States. However that may be, the question

"is not frivolous, and in such case the state grants to "to this court jurisdiction to issue the writ of error "directly to the District Court, and therein to decide "the case without being restricted to the constitutional "question. *Horner* vs. *United States*, 143 U. S., 570, "36 L. Ed., 266, 12 Sup. Ct. Rep., 522. It is not the "habit of the court to decide questions of constitutional "nature unless absolutely necessary to a decision of the "case. Having jurisdiction to decide all questions in "the case on this writ of error, we deny the motion for "a *certiorari* and proceed to an examination of the "record."

Mr. Justice Harlan, who alone dissented from the majority opinion of the court, does not dissent from these views, and it may therefore be taken as the unanimous opinion of this Honorable court, that a federal question, which is not frivolous, gives the plaintiff in error the right under the statute to a writ of error to this court; gives this court jurisdiction to issue the writ of error and then to decide the case without being restricted to the constitutional question.

In other words, the writ of error in the case at bar was properly sued out, providently allowed and the entire record is now before your Honorable court to determine whether justice, according to law, has been done between the parties in the premises.

In the case of Horner against the United States. 143 U. S., 570, in which Horner took an appeal to this court from an order dismissing the writ of habeas corpus and remanding him to the custody of the marshal, Mr. Justice BLATCHFORD, writing the unanimous opinion of this court, said at page 576:

"It is contended on the part of the United States "that, as the appeal in this case was taken on Novem- "ber 17, 1891, after the act entitled 'An Act to estab-

"lish Circuit Courts of Appeal, and to define and regu-
"late in certain cases the jurisdiction of the courts of
"the United States, and for other purposes,' x. 517,
"passed March 3, 1891 (26 Stat., 826), went into effect,
"this court has no jurisdiction of this appeal and that it
"ought to have been taken to the Circuit Court of Ap-
"peals for the Second Circuit. But, as the constitu-
"tionality of Sec. 3894, as amended, is drawn in ques-
"tion, an appeal in this case lies directly to this court
"from the Circuit Court, under Sec. 5 of the Act of
"March 3, 1891, which gives such appeal 'in any case
"in which the constitutionality of any law of the United
"States * * * is drawn in question.' This is in
"accordance with our decision in *Nishimura Ekin* vs.
"*United States*, 142 U. S., 651, 658, 659, where it was
"said: 'As this case involves the constitutionality of a
"law of the United States, it is within the appellate
"jurisdiction of this court, notwithstanding the appeal
"was taken since the act establishing circuit courts of
"appeals took effect. Act of March 3, 1891, c. 517,
"Sec. 5; 26 Stat., 827, 828, 115.' We are further of
"opinion that where an appeal or writ of error is taken
"directly to this court under Sec. 5 of the Act of March
"3, 1891, in a case in which the constitutionality of a
"law of the United States is drawn, this court acquires
"jurisdiction of the entire case, and of all questions in-
"volved in it, and not merely of the question of the
"constitutionality of the law of the United States. This
"is shown by the fact that, under Sec. 5, where an ap-
"peal or writ of error is taken direct to this court, in a
"case in which the jurisdiction of the District Court or
"of the Circuit Court is in issue, it is specifically directed
"that 'the question of jurisdiction alone shall be certi-
"fied to the Supreme Court from the court below for
"decision,' but there is no kindred limitation prescribed
"in regard to any of the other cases in which jurisdic-

"tion in this Court of Appeals or writs of error is given "by Sec. 5."

Section 5 of the Act of March 3, 1891, being Chapter 517 of the Acts of the fifty-first congress, second session, is as follows:

"§ 5. That appeals or writs of error may be taken "from the District Courts, or from the existing Circuit "Courts, direct to the Supreme Court, in the follow- "ing cases: In any case in which the jurisdiction of "the court is at issue; in such cases the question of "jurisdiction alone shall be be certified to the Supreme "Court from the court below for decision.

"From the final sentences and decrees in prize "causes.

"In cases of conviction of a capital or otherwise in- "famous crime.

"In any case that involves the construction or ap- "plication of the constitution of the United States.

"In any case in which the constitutionality of any "law of the United States, or the validity or construc- "tion of any treaty made under its authority, is drawn "in question.

"In any case in which the constitution or law of a "state is claimed to be in contravention of the consti- "tution of the United States.

"Nothing in this act shall affect the jurisdiction of "the Supreme Court in cases appealed from the high- "est court of a state, nor the construction of the statute "providing for review of such cases."

This is the act construed in the foregoing cases. An examination thereof will show that it is only under the first subdivision, to-wit, in any case in which the jurisdiction of the court is in issue, that in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

This is the only limitation upon the power of this court to examine the record, and in the two foregoing cases which came up under other subdivision of this statute, this court has held that its power to examine the whole record and to reverse the judgment for error therein appearing, is not confined to the federal question involved.

Now Sec. 709 of the revised statutes of the United States, under which the writ of error in the case at bar is prosecuted by the plaintiff in error, reads as follows:

> "Sec. 709. A final judgment or decree in any suit "in the highest court of a state, in which a decision in "the suit could be had, where is drawn in question the "validity of a treaty or statute of, or an authority ex- "ercised under the United States, and the decision is "against their validity; or where is drawn in question "the validity of a statute of or an authority exercised "under any state, on the ground of their being repug- "nant to the constitution, treaties, or laws of the United "States, and the decision is in favor of their validity; "or where any title, right, privilege, or immunity is "claimed under the constitution, or any treaty or statute "of, or commission held or authority exercised under "the United States, and the decision is against the "the title, right, privilege or immunity specially set up "or claimed by either party under such constitution, "treaty, statute, commission, or authority, may be re- "examined and reversed or affirmed in the Supreme "Court upon a writ of error. The writ shall have the "same effect as if the judgment or decree complained "of had been rendered or passed in a court of the "United States; [and the proceeding upon the reversal "shall be the same, except that the Supreme Court "may, at their discretion, proceed to a final decision of "the case, and award execution, or remand the same to "the court from which it was removed].

"The Supreme Court may [reaffirm], reverse, modify "or affirm the judgment or decree of such state court, "and may, at their discretion, award execution, or re- "mand the same to the court from which it was re- "moved by the writ."

The writ of error in the case at bar, as appears on the face thereof, was allowed under the authority conferred by this section. It will be seen that there is no more limitation upon the powers of this Honorable Court to examine the complete record which comes up on writ of error allowed under this section than there is under Sec. 5 of the Act of March 3, 1891, outside of the first subdivision thereof. It is, therefore, the law that upon this writ of error it is the privilege, and we respectfully urge becomes the duty of this Honorable court to examine the record in this action, and, if the contentions of the plaintiff in error be correct, even though this Honorable court should determine that the federal question raised by the plaintiff in error was properly decided by the state court, to reverse the judgment and remand this case to the court whence it came for further proceedings not inconsistent with the opinion of this Honorable court.

The plaintiff in error, therefore, contends that it is entitled to a new trial before a jury of the county where the action was brought. That it is the duty of the trial court to admit in evidence the medical testimony offered upon the first trial and rejected. Upon such new trial it will be the duty of such jury to hear the said medical evidence, and upon their oaths as jurors, to determine whether or not Emanuel Meyer did in fact commit suicide.

The medical testimony naturally falls into two classes whose admissibility in this action of covenant must be examined separately. If the plaintiff in error is correct in its

contention that the sections of the New York Code of Civil Procedure are not part of this Illinois contract, and that the contract was not made subject to the provisions thereof, then all of the medical testimony, so far as relevant and material, must be read in evidence and received by the jury. But if this court shall hold that the contract is subject to those sections of the code, then arises what in the opinion of the learned Justice, GRAY, is called "the difficulty in this case," which, in his judgment, entitles the defendant to a new trial in this action, That is the exclusion of the evidence of Dr. Bruso.

No stronger argument upon this phase of this case can be made than that of the learned justice, which, because of its lucidity, absolute logic, emminent fairness, judicial tone and forensic reasoning, the plaintiff in error here adopts and begs leave to subjoin.

> "The difficulty in this case, which, in my judgment, "entitles the defendant to a new trial in the action, is "the exclusion of the evidence of Dr. Bruso, called as "a witness for the defendant, and asked to state a con- "versation had with Meyer, the deceased. This wit- "ness was a physician, having his office in the City of "Buffalo, in this State, near to the Iroquois Hotel. He "testified that in the early morning, one of the bell "boys of the hotel came for him, and, upon entering "one of the rooms, he found a man in the bed suffer- "ing from pain and vomiting. Objection being made "to his evidence, which was in the form of a deposi- "tion, the court put the question: 'Did this doctor "treat him?' The defendant's counsel replied: 'He "inserted something hypodermically into the man "against his wish.' The objection to the testimony was "sustained, the defendant excepted and the whole "deposition of the witness was excluded, under the "previous ruling of the court, that sections 834 and

"836 of the Code of Civil Procedure applied. From "the deposition, thus offered and excluded, it ap- "peared that the witness had a conversation with "Meyer, which was narrated, so far as material, as "follows: 'I asked him what he had been doing and "he told me it was none of my damned business, that "he didn't want me in there and he wanted me to get "out of there. * * * I looked around the room. " * * * I found * * * a box of "rough on "rats" * * * empty. * * * He told me he "had taken it * * * because he wanted to die " * * * he didn't want to get well * * * "he didn't want me to do anything. * * * I pre- "pared a hypodermic injection * * * and stimu- "lated him, so he would not die in the Hotel Iroquois. " * * * When I was going to give him the "hypodermic, he said, "You, [cursing him in foul "language] keep away from here. Didn't I tell you "to keep away?" I paid no attention to him and gave "him the hypodermic.' The witness, was then asked "if he knew what was the cause of the condition of "the man and he answered that it was arsenical "poisoning and that the symptoms evidenced it. The "deceased was immediately conveyed from the hotel "to the hospital, where he died soon afterwards. The "evidence of Dr. Bruso was deemed inadmissible "under the provisions of section 834 of the Code, "which prohibits a physician from disclosing 'any in- "formation which he acquired in attending a patient in a "professional capacity, and which was necessary to "enable him to act in that capacity.' The agreement "of the insured, contained in his application, which "waived for himself, his representatives and benefi- "ciaries, 'any and all provisions of law, now or here- "after in force, prohibiting * * * any physician " * * * attending me * * * from disclos-

"ing or testifying to any information acquired thereby,' "and which expressly consented to such testimony "being given in any suit, was held below to be in- "sufficient to meet the requirement of section 836 of "the Code, that the provisions of section 834 must be "expressly waived upon the trial by the personal repre- "sentatives of the deceased patient. Such a waiver "was refused at this trial. Our recent decision in "*Holden* vs. *Metropolitan Life Ins. Co.* (165 N. Y., "13), justified the ruling below upon the question of "the force of the waiver in the insurance contract. "Theretofore, it had been the rule to regard such a "waiver as a binding part of the contract of insurance "and, as such, available to the insurer in any action "upon the policy. (*Foley* vs. *Royal Arcanum*, 151 N. "Y., 196.)

"But was there disclosed that relationship of physi- "cian and patient between the deceased and Dr. Bruso "which made operative the prohibitory provisions of "section 834? As the inadmissibility of such testi- "mony is only because of the statute, it is quite im- "portant that the case should come very clearly within "its terms, however liberal the construction which we "should give to an enactment intended to promote the "ends of justice. The object of this legislation was to "render privileged what communications are made "between a physician and his patient; but, obviously, "it is essential that it shall appear that the person at- "tended is his patient, in the sense in which such a term "is ordinarily understood. In *Griffiths* vs. *Metropolitan* "*Street Railway Company*, (171 N. Y., 106), we, "quite lately, had occasion to consider such a question "under a state of facts, not essentially, dissimilar to "that now before us. In that case the plaintiff brought "his action to recover damages for injuries sustained "through the negligence of the defendant's servant, a

"gripman upon one of its cars. The defendant called "a physician, as a witness, who was at the scene of the "accident, when an ambulance arrived, and who ren- "dered 'first aid' to the plaintiff. The witness was, "also, an attending physician at the hospital to which "the plaintiff was assisted by him in the ambulance; "but he rendered no further services to him while in "the hospital. The witness was asked to relate a con- "versation, which he had with the plaintiff in the hos- "pital, subsequently; but the court sustained an object- "ion to its admissibility under section 834 of the Code "and the witness was not allowed to testify to what was "said by plaintiff with reference to his sufferings, or to "the accident. When the case reached this court, it "was held that the exclusion of the physician's evi- "dence was an error for which the judgment should be "reversed and a new trial had. The decision by this "court rested upon the ground that the burden upon "the plaintiff of showing that the evidence was within "the statutory prohibition had not been met, and that "the facts did not warrant the presumption that the re- "lation of physician and patient existed. The opinion, "quite fully reviewed the cases illustrating the appli- "cation of the statutory provision in question, and that "the rule was distinctly adhered to that, to warrant the "application, it must appear that the relation of phy- "sician and patient, at the time existed, and that the in- "formation sought to be excluded was necessary to "enable the physician to act as such. Previous to the "Griffiths case that rule had been expressed in *People* "vs. *Koerner* (154 N. Y., 355).

"Can we say that the rule applies to such a situation, "as that disclosed in this case, any more than it did in "the Griffiths case? I think not. *It seems to me to be* "*difficult to assert, with any gravity of countenance, at* "*least, with Meyer rejecting the witness' presence and*

"services, and cursing against his interference, and with "the witness' determined efforts to prevent Meyer from "dying in the hotel, whose servants had summoned him, "that the relation of physician and patient arose, and "that the confidential relation existed, which the statute "has in view, and which, with a tender solicitude for a "patient's interest, it is designed to safeguard."

(The italics are ours).

POINT FOUR.

The opinion of the New York Court of Appeals.

The Court of Appeals erred in two essential points. They are:

(*a.*) That the contract in question is not an Illinois contract, but a New York contract, made in contemplation of and subject to the statute whose validity is here attacked when it is sought to stretch its obligation impairing qualities over the foreign contract, and

(*b.*) That the relationship of physician and patient ever arose between Druso and Emanuel Meyer.

(*a.*) The essential vice of the contention that this is a New York contract arises from a departure from those strict rules of definition which have always been deemed necessary by thinking men to be applied to those sciences which rest upon logic and reasoning.

Nothing can be clearer than that the application in this record is an offer to enter into a contract of insurance made by Emanuel Meyer to the plaintiff in error.

Nothing can be clearer than that the acceptance of that offer is evidenced by the execution of the benefit certificate, the sole evidence in this record of the acceptance of his application.

Nothing can be clearer than [nor is there any higher order of evidence known to the common law than the production in court of the original specialty] that the offer was accepted as recited in the specialty on the 20th day of September, 1894, at Chicago, Illinois.

And nothing can be clearer than that, in that moment *and at that place*, the contract sued upon arose, and that the colition of the minds of the parties *there* had breathed into that contract the legal breath of life.

Its birthday was September 20, 1894, *and its birthplace* CHICAGO, ILLINOIS.

Nothing then remained to be done, the conditions were fixed, neither party could alter the contract without the consent of the other.

In order to hold otherwise, it is necessary to decide that had Emanuel Meyer died the next day and before delivery of the certificate to him, then no obligation to pay the secured sum to his beneficiary would have existed. But this is not the law.

Fidelity Mutual Life Ass'n vs. *Ficklin*, 74 Md., 172.

Welsh vs. *Continental Ins. Co.*, 47 Hun., 598.

Clark vs. *Union Fire Ins. Co.*, 6 Ont. Rep., 223.

May on Insurance (4th Ed.), Sec. 54c.

It is also necessary to decide that the elementary rule that the contract arises upon the acceptance of the offer is not the law of this land. The desire to reach particular results must never lead courts to abandon that strict adherence to logic, which alone rescues the law from the domain of chance and elevates it to the pedestal of an exact science; which alone enables the law to hold its proper and legitimate place as a great instrument of human civilization, of human enlightenment and of human happiness.

The foundation of our common law is the doctrine of *stare decisis*, and once we let down the bars to loose reasoning, throwing over the pillars of elementary definition and crushing the arches of rigid syllogism, the whole beautiful superstructure of our jurisprudence totters and falls of its own weight, burying in ruins all that our ancesters have so hardly earned, a government of law and not of men.

Mrs. Meyer may be a widow deserving of charity, or she may not. That question is irrelevant and immaterial to this discussion.

Where did the contract in suit arise? Surely contracts arise where and when they first become binding upon the obligors. Is there any possibility of controverting this?

The fact that the then named beneficiary resided in New York when the application was signed, has no more to do with the question than has the capture of Port Arthur, for

(a.) no one could say she would be living there when her rights became vested by Meyer's death. She might well have been living in Muckden, Paris or Constantinople.

Shall we then say that the Chinese, or perchance Russian or Japanese law governed this contract because that had become the place of performance, or the French or Turkish law?

And

(b.) for a more serious reason, that it was always in the power of the member to change his beneficiary without her consent.

> " * * * Any person who became an appointee "in such a certificate took the position subject to the "absolute right of the member to substitute a new one "at any moment. The rights acquired by the member "by virtue of this relation did not amount to a chose in

"action. He had no interest in the society that was "assignable or transferable until some right of action "had accrued. The appointee had no vested interest "in the sum which might in a contingency become "payable on death of the member. (*Hellenberg* vs. "*Dist. No. 1, supra; Sanger* vs. *Rothschild, supra;* "*Brown* vs. *Catholic Mutual Benefit Assn.*, 33 Hun., "263; *Boasberg* vs. *Cronan*, 30 N. Y. S. R., 483.)"

Sabin vs. *Phinney*, 134 N. Y., 422 at 428.

So Meyer, at any time during the life of the certificate, could have changed the beneficiary to a sister in Chile, a brother in Bangkok, his mother in Austria or his father in Costa Rica.

If that be the test, what *is* the law of the contract?

Is it not beyond question, cavil or doubt that the place whose law is to be read into this contract is the law of the place where the *offer* to be insured was changed by the acceptance of that offer by the offeree into *a contract of* insurance?

Can it be seriously contended in this case that any one spot on this great earth other than Chicago, Illinois, complies with this definition?

The court of Appeals of New York says at record folio 106:

"By the terms of the certificate, the agreement of "the defendant was subject, not only to the conditions "subscribed to by the member in his application, but "'to the further conditions and agreements hereinafter "named,' and the clause containing his acceptance, "above quoted, was one of those 'further agreements.' "From these terms of the agreements of the parties "the only natural conclusion is that the place of the "contract was where it was intended, and understood, "to be consummated. Its completion depended upon

"the execution by the member of the further agree-
"ment endorsed upon the certificate, namely to accept
"it 'subject to all the conditions therein contained.'

"The contract was not completed, in the sense that
"it was binding upon either party to it, until it was de-
"livered in New York after the execution by the mem-
"ber of the further agreement expressing the unqual-
"ified acceptance of its conditions."

Are not the agreements set forth *quoad "agreements"* in the certificate? Are they not called *"agreements"* in the certificate?

If this acceptance were one of "the further agreements" would it not be so called? Would the clause not have read:

"*It is further agreed* by the undersigned that he hereby accepts the certificate of the membership subject to all the conditions therein contained."

Why is the word THEREIN used in the acceptance, if it is part of the instrument? The acceptance should be "of all the conditions HEREIN contained."

HEREIN, not THEREIN.

This part of the opinion of the learned justice (Mr. Justice Gray), although concurred in by the whole court, must be deemed a piece of reasoning in which the later schoolmen might have taken delight, but which blackens and curls up in the fierce light of reason and before the attack of rigid logic and exact definition.

(b.) To show that the relationship of physician and patient did *not* arise between Dr. Bruso and Meyer, we ask no better advocate than Mr. Justice Gray. We can advance no stronger argument, no more cogent reasoning, no more pitiless logic, than is contained in that branch of his great dissenting opinion which deals with this question.

Laying at his feet the tribute of our admiration for his magnificent discussion of this question, we respectfully quote his opinion on the subject of the relationship between Bruso and Meyer, hereby adopting it as our own (*supra*).

POINT FIVE.

The importance of the question.

That this question is of more than ordinary importance to the population of this whole country, for which this court announces the law, it becomes our duty at this time to point out the importance of the questions here involved in the jurisprudence of America.

We feel justified in calling attention, in a general way, to the radical differences between the contracts of life insurance companies and fraternal benefit societies.

It is true that both systems have medical examinations of applicants, tables for fixing the contributions of members, may have reserve or surplus funds, and both provide for the payment of sums at the death of the insured. All of these features are essential to both systems, because the death element is common to them. There is no similarity in the objects, organizations, plans of operation, contractual relations with members or rights of the beneficiaries.

The life companies are financial enterprises, organized and conducted for the purpose of profit. Their premium tables contain three elements: Expense, reserve and mortuary, and are so constructed as to yield an excess over the demands upon each. The plan upon which they are organized does not contain any provision for meeting a deficit, because none is contemplated.

Their business is selling insurance, at a fixed price for limited terms, or for life. The corporation is the con-

tractor who sells, and the insured is the customer who buys. Their interests and relations are always opposite.

The policy of insurance issued by these companies is an unyielding contract, fixing all the relations and rights of the parties, without future modifications.

The insured has no more interest in the corporation than has a depositor in the bank with which he does business; and the profits arising from the surplus or excess collected from him or the accumulations of interest, are generally no more his property than are the earnings of the banks from loans of deposits the property of customers. As soon as the policy is written, the beneficiary, who need not be a relative, has a property interest; and that interest can not be changed to another by the corporation, the insured, or both, without the consent of the person thus designated.

These companies have a fixed premium, and a fixed liability to the beneficiary named in the policy.

There is no reservation of power by the insured; he has no voice in the business policy of the corporation, and has no other interest in its future than that it shall survive him, and be able to carry out its contract.

What is said here is equally true of all regular life companies, whether they be ordinary stock, mutual or assessment companies.

Fraternal societies are purely mutual, being fraternal, and the outgrowth of a practical plan of charity. Their plan is such that the members are both insurers and insured. The old members solicit new ones and contribute to the common funds of the society; they unitedly enact new laws or modify existing ones, thereby changing their contracts with each other at pleasure. These contracts consist of the charter, application, by-laws and benefit certificate.

The members are not only the insurers and insured, but are legislators, managers and joint shares in all the benefits and relationships incident to equality of burdens and benefits. The fraternal corporation is merely a piece of machinery through which, as a medium, the members contract with each other. The fraternal societies were not generally incorporated until recently; and their incorporation is solely for convenience. The officers and managers of such societies are selected for short terms, are constantly changing, and are generally men of little or no experience in the business of life insurance.

There is no division of profits or excess over current demands, for there are no profits earned. Their tables of rates are based upon a minimum expectancy of requirements and any deficiency is provided for by special assessments.

The beneficiary has *no vested interest*, but may be changed at will by the member, within the relations of kinship and dependency. The tables of assessment may be changed, and the promised benefits may be enlarged at the will of the governing body, which is composed of representatives chosen by and from the membership. The whole scheme is controlled by the voice and action of the insured. The most humble member holding the smallest benefit certificate issued has equal voice in the society with the most exalted. The fraternal insurance plan is the product of the times, and was designed and is conducted for the purpose of filling the place in the economy of civilization heretofore occupied by organizations of practical charity.

Formerly, when a member of a secret fraternal society died the members passed the contribution list to pay off the mortgage left hanging over the home of the widow and orphan. As an outgrowth of that inadequate plan of relief

and charity, and with the same spirit of brotherhood, the fraternal insurance plan was inaugurated.

In life insurance companies, the element of profit production is the inducing factor for incorporation and development. In fraternal societies, in addition to the social benefits extended, the desire is to obtain mutual protection at a minimum cost to each member. In one, the attraction is profit, in the other it is saving. In one, the insured pays a large sum to the others to solicit new business and manage the enterprise; in the other, the member shares with his fellows the labors of soliciting accessions and the administration of the joint business, in order that he may secure he benefits at a saving sometimes of an amount equal to two-thirds the financial cost of the life company plan.

It will be seen from the foregoing that the two systems differ in cost, plan, management, interest and responsibilities. The object to be attained is entirely different in these systems, and the method of accomplishment is equally divergent from any point of view that may be selected.

Some idea of the interests involved may be obtained from the following fact: The societies of the class represented by the plaintiff in error have an aggregate membership in America of over four million members.

During the year 1902, fraternal societies in the United States paid to members' beneficiaries more than $56,000,000 in cash benefits, and at the end of the year 1902 these societies had 4,332,973 beneficial members (social members not counted) in good standing upon their books, who were carrying protection in such societies amounting to $6,374,471,930, nearly $7,000,000,000.

New York Insurance Report, 1903, pp. VI & VII, of parts III & IV.

Every such contract affects not only the member, but at least one beneficiary, and the average number of beneficiaries is probably at least equal to double that. Moreover, where the father and head of the household makes the mother, his wife, the beneficiary, the proceeds are as much used for the benefit of the children in the great majority of cases as for the actually named beneficiary.

It is largely true that the class of people who use this form of life insurance can not afford the Old Line Insurance, and that their estates usually contain but little outside of the proceeds of these benefit certificates. It will, therefore, be readily apparent that about one person in five in these United States is adversely affected by any decision which tends to weaken these benefit certificates or to enhance the cost of this form of insurance.

It needs not be argued here that if risks of the class here sought to be enforced by the defendant in error are to be deemed within the provisions of the certificate, that the cost of meeting those risks must fall upon those who can but ill afford the expense.

It can not be asserted too often or too strongly that these organizations are not organized for profit, but for saving. The act of the congress incorporating the plaintiff in error provides that the society is not organized for profits, its purposes being purely benevolent. That such societies endeavor to give the poor man the same assurance as the great financial institutions that his loved ones will be safe from the pangs of hunger after his death, and that no profit is sought, no dividends have to be paid upon stock held by investors, that but little has to be earned to pay the moderate salaries of the officers thereof.

But it must be asserted just as strongly and just as often that these organizations must not and can not sell insurance

below cost; that every increase in the cost, increases the burden upon the member; that every risk the organization is compelled to assume increases the cost to the member, and that when risks have been excluded for reasons which are good in morals, courts should be slow to saddle honest members with the payment of certificates to which moral obloquy is attached. It is peculiarly true of a fraternal society that a court should not be astute to emblazen across the face of its benefit certificates the cynical maxim of the dissolute Roman Emperor, "*Pecunia non olet.*"

The fact can not be denied that Meyer suicided, and that his death was accomplished by a conscious and deliberate act committed with the criminal purpose accomplished. Except for the liberal and highly equitable rule of the society to voluntarily agree to pay a part of the certificate, nothing would be due the beneficiary. This Honorable court has long ago announced the public policy of this country to be against the enforcement of contracts of insurance in cases where the insured suicided. Even if the risk under the contract expressly covered death by suicide the contract could not be enforced because such a provision would contravene public policy.

Ritter vs. *Mutual Life Ins. Co.*, 169 U. S., 139.

19 Am. & Eng. Encyp., p. 74.

POINT SIX.

The Holden case, supra, is inapplicable to the case at bar.

The testimony of the physicians in the case at bar ought to be admitted on grounds of fair dealing and equitable conduct towards Meyer's fellow-members.

This Honorable court will take judicial notice of the universally known fact that the contributions of the members to the insurance fund of mutual benificiary societies, like the plaintiff in error, are based, as to frequency and amount, upon tables of mortality experience, and that by the exception of certain causes of death from the covered risk, Meyer was enabled to secure a very considerable reduction in the cost of that assurance.

These exceptions are set forth in his application (Rec., fol. 160). A glance of them will show that these exceptions are of such causes as involve active moral turpitude, are the results of his own wickedness or folly, and are not, any of them, the results of unmerited misfortune, or unavoidable by the man of common decency and honor. They are:

1. Suicide.
2. Intemperance.
3. Drug habits.
4. Duelling.
5. Death at the hands of justice for the committing of crime.
6. Death occasioned by or during violation of the criminal law.

This by-law has been held valid in the home of the corporation.

Supreme Lodge, Knights of Pythias vs. *Clarke*, 88 Ill., App., 600.

Seitzinger vs. *Modern Woodmen of America*, 204 Ill., 58.

The former case was an action brought upon a contract in all respects like the one at bar. Clarke committed suicide by the taking of morphine, and the defendant tendered the amount due under the suicide by-law, as in the case at bar. The jury having found a verdict for the plaintiff for the full amount, and the defendant having appealed, Mr. Justice BIGELOW, in writing the opinion upon which that judgment was reversed, after discussing the evidence which showed that Clarke had committed suicide, had this to say:

"The Supreme Court of the United States in *Bigelow* vs. *Berkshire Life Ins. Co.*, 93 U.S., 284, after stating that insurance companies could, by stipulation, avoid various classes of risks, said:

"'*Surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they can not limit their liability, if the assured is, in proper language, told of the extent of the limitation, and it is not against public policy.*'

"*It is admitted that the assured was told in his certificate and the by-law adopted by appellant, which, taken together, formed the contract between the parties, that if his death should 'result from suicide, either voluntary or involuntary, whether * * * sane or insane at the time,' the amount to be paid to the beneficiary would be the value of the certificate at his death, to be computed in the manner set forth in the stipulation.*

"*By this agreement the amount to be paid was conditioned on the manner of death of the assured.*

"If he should meet death in due course of nature, one sum was to be paid to the beneficiary, but if he should take his own life, another and a less sum was to be paid. In no event was there to be a forfeiture of the so-called policy, but the plain agreement was, that the beneficiary was not to profit by an act of the assured in taking his own life, and the order of which he was a member was not to be wronged because of the act. *It seems to us that such a contract should be regarded with favor by courts, as it is not easy to conceive of one more just and equitable to all parties concerned.*

"But if the contract is to be regarded the same as a policy of a life insurance company, containing a clause providing that if the assured should commit suicide, whether sane or insane at the time, the policy should become void; and if it is held that the words 'sane or insane' do not embrace all species of insanity, as is contended in the instruction given by the court, there still remain the words 'voluntary or involuntary.' applied to the word 'suicide.'

"It must be conceded that the adjective 'voluntary' in nowise dequalifies the noun 'suicide,' when the latter is used in its strictly legal sense, since in that sense all suicide is voluntary, and in such a sense there can be no involuntary suicide. But the word 'involuntary' was used in its popular sense, and it should be so construed as to give it the meaning intended by the parties using it, and when so construed it means self-destruction without volition, and embraces, as we think, every act of self-destruction not voluntary or intentional.

"*No authority has been cited and we are unable to find any holding an agreement against public policy which provided that if death resulted from suicide, whether sane or insane, the policy should become void, and we can not so hold.*"

In the very late case of *Seitzinger* vs. *Modern Woodmen of America*, 204 Ill. (*supra*), decided on October 26, 1903, the Supreme Court of Illinois held in construing a by-law, in terms almost the same as the one at bar.

> "A clause in a life policy providing against liability "if the insured 'shall die by his own hand, whether "sane or insane,' is a complete exemption from liability "in the case of suicide by the insured, notwithstanding "he was wholly insane and totally incapable of under- "standing the physical nature and effect of his act."

An illustration will make clear what we have said, that it would be inequitable, unfair and unjust to compel Meyer's fellow-members to cover a risk specifically excepted by the contract, where that risk involved active moral turpitude. A man is assured by the membership of the plaintiff in error upon liberal terms made possible by the belief that he will not run the risk of cutting short his life and his contribution to the general fund, by engaging in the commission of crime. With the assurance that his contract will be made a dead letter by the State of New York, through its exclusion of evidence, valid and admissible under the contract, he engages in the robbery of a bank, is attacked and mortally wounded—callously tells of his crime to the physician first on the scene, and dies. Will the courts of the State of New York aid his heirs to extort the face liability of the certificate from the law-abiding membership of the plaintiff in error, and thus present the curious picture of the courts of justice aiding the fraudulent to amerce the innocent?

But what else is the result in the Meyer case—or are the facts in the given illustration, *mutatis mutandis*, too strongly stated? What Meyer did, put into his own words (Rec., fol. 75), was to boast of his crime against himself, his family,

his State and his God, and in the shadow of approaching death, summoned by his own act, to blaspheme the name of his Maker, and to curse the helping hand which was stretched out in an unaccepted offer to assist him. Language which paints him, out of his own mouth, a hardened moral nature, the essential and fundamental criminal engaged in perpetrating his last fraud, which in its extent was to affect (with the countenance and aid of our courts of justice, if the error committed by the New York courts is not corrected), every man to whom he had sworn brotherhood and to rob the innocent, law-abiding and decent, by resting upon a construction of a praiseworthy statute, which would twist it into an instrument of deliberate robbery.

It needs but to be pointed out to show the monstrous injustice of applying the decision in the Holden *supra* case to the case at bar. This has been made clearer by the discussion of the essential and underlying fundamental difference of the contract in question from the ordinary contract of life insurance (sometimes called old line insurance).

See Point Three, *supra*.

POINT SEVEN.

The Holden case is anomalous in the law.

When the application was offered and received in evidence on the trial of this action at that moment the stipulation waiving the physicians' privilege became part of the record and the waiver was, therefore, made upon the trial of the action.

Foley vs. *The Royal Arcanum*, 78 Hun., 222.

Dougherty vs. *The Met. Life Ins. Co.*, 87 Hun., 15.

Holden vs. *The Met. Life Ins. Co.*, 11 App. Div., 426.

The defendant in error relies upon the opinion of the Court of Appeals of the state of New York in the Holden case, 165 N. Y., 13, but the plaintiff in error contends:

(*a.*) That that case has no application to the case at bar, and

(*b.*) That section 836 of the Code of Civil Procedure when applied to a case like the one at bar, impairs the obligations of the contract and is not merely a rule of evidence.

(*c.*) The Metropolitan Life Insurance Company is a so-called "old line" company which in making up its table of insurance rates takes into consideration the suicide statistics, whereas with the plaintiff in error at bar it is a far different case.

No provision is made by the plaintiff in error to cover premature claims arising out of suicide and it only calls its assessments after the death of the member has actually taken place.

This is a beneficial association, and in many respects the courts have drawn sharp distinctions between this class of insurance and that conducted on the so-called Old Line plan, which is other than mutual and looks to profit.

The only instance in the law of the state of New York holding that the waiver in question does not take the case out of the statute is the Court of Appeals decision in the Holden case, *supra*. Recognizing the distinction between the two classes of insurance the appellant respectfully urges that this Honorable court should seek to limit that decision rather than to extend it. In the first place the construction there given to the statute opens wide the door to fraud against the helpless society and should therefore be confined strictly to the facts as they appeared in the Holden case. This contention is the more strongly urged because

every decision in the state of New York upon the subject was exactly to the contrary up to the time the Holden case was decided by the Court of Appeals.

Hewitt vs. *Prime*, 21 Wend., 79.
Foley vs. *Royal Arcanum*, *supra.*
Dougherty vs. *The Met. Life Ins. Co.*, *supra.*
Holden vs. *The Met. Life Ins. Co.*, *supra.*
Edington vs. *M. L. Ins. Co.*, 67 N. Y., 185.
Pierson vs. *People*, 79 N. Y., 424.

See also:

G. R. R. R. Co. vs. *Martin*, 41 Mich., 671.
Hunt vs. *Blackburn*, 128 U. S., 470.
Blt. & S. D. Co. vs. *L. Ins. Co.*, 34 Fed. Rep., 870.
Sentenis vs. *Ladew*, 140 N. Y., 463.
Mayor etc., vs. *M. R. Co.*, 143 N. Y., 1.
Greve vs. *A. E. L. S. Ins. Co.*, 81 Hun. 28.
Rosseau vs. *Bleau, et al.*, 131 N. Y., 177.
Ins. Co. vs. *Martin*, 3 N. W., 173.
Fuller vs. *Knights of Pythias*, 40 S. E., 65.
Woodmen of the World vs. *Loeher*, 68 Pac., 136.
Woodmen of the World v. *Grandon*, 69 N. W., 448.

The Court of Appeals itself, in affirming the case of *Foley* vs. *Royal Arcanum*, 151 N. Y., 196 (reported below in 78 Hun., 222), which was decided but a few years before the Holden case, uses the following language:

> "A more serious question is presented with reference to the waiver. It is contended that a waiver before the trial is against public policy, and that the law at the time of the trial did not permit it. The law, as it stood at the time the contract was made, provided that 'a person duly authorized to practice physic or surgery, shall not be allowed to disclose any informa-

tion which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.' Section 836 provided that 'the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client.' At the time of the trial, the last section had been amended so as to require the waiver to be made upon the trial. It will thus be seen that the right to waive is given by the express provisions of the Code. The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had is unquestioned, but it can not pass an act impairing the obligations of a contract. The waiver, as we have seen, was a part of the contract. It was made to induce it. It was authorized by the Code, and is binding upon the parties unless the making of it at that time was against public policy."

Applying the decision in this case to the case at bar, we find them to be upon all fours.

The Foley Case.	The Meyer Case.
"It will thus be seen that the right to waive is given by the express provisions of the Code."	The right to waive, as has been shown, existed under the law of the place where the contract was made, *i. e.*, the State of Illinois.
"The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had, is unquestioned,	The right of the legislature to establish rules of evidence and to make them applicable to all trials thereafter had, arising out of con-

but it can not pass an act impairing the obligations of a contract."

tracts with which the legislature of the State of New York has power to deal (*i. e.*, New York contracts) is unquestioned, but it can not pass an act impairing the obligations of a contract.

"The waiver, as we have seen, was a part of the contract."

The waiver, as we have shown, was a part of the contract.

"It was made to induce it."

It was made to induce it.

"It was authorized by the Code," the *lex loci celebrationis.*

It was authorized by the laws of Illinois, the *lex loci celebrationis.*

"And is binding upon the parties unless the making of it at that time was against public policy" [as public policy is declared by the courts of the State of New York, which is the jurisdiction within which originated this contract].

And is binding upon the parties unless the making of it at that time was against public policy as described by the courts of the State of Illinois, the place where the contract was made, as we have shown.

In this case this court held the waiver not to be against public policy.

No decision of the courts of the State of Illinois has ever been made holding such a waiver to be against public policy.

It is, therefore, a conclusion which can not be resisted that the waiver in the case at bar was, under the decisions,

effective and binding, and the judgment should, therefore, be reversed for the error of the learned trial justice in disregarding the same.

In the matter of N. Y., L. E. & W. R. Co., 98 N. Y., 447, the Court of Appeals, speaking through EARL, J., say at page 453:

> "Parties, by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals, or sound public policy, have been, and will be enforced; and, generally, all stipulations made by the parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts."

In the matter of Colem , 111 N. Y., 220, an attorney of the testator was requested to sign the attestation clause of the will as a witness. It was held that this was an express waiver within the meaning of section 836 of the Code. In this case it will be seen that the waiver was before the death, and intended to take effect after death upon the probate of the will. RUGER, Ch. J., in delivering the opinion of the court, says with reference thereto:

> "It can not be doubted that, if a client in his lifetime should call his attorney, as a witness in a legal proceeding, to testify to transactions taking place between

himself and his attorney while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations upon a judicial proceeding to take place after his death? We think not. The act of the testator, in requesting his attorneys to become witnesses to his will, leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove."

In *Adreveno* vs. *M. R. F. Life A.* (34 Fed. Rep., 870), the action was upon a certificate of insurance which contained a clause of waiver similar to the one we have under consideration. The statute of Missouri provided that "the "following persons shall be incompetent to testify: A phy-"sician or surgeon, concerning any information which he "may have acquired from any patient while attending him "in a professional character, which information was neces-"sary to enable him to prescribe for such patient as a physi-"cian, or to do any act for him as a surgeon." THAYER, J., said:

"The statute is construed in this state as conferring a privilege merely that may be waived; it is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of *Cahen* vs. *C. L. Ins. Co.* (41 N. Y.

Super. Ct., 296); *R. R. Co.* vs. *Martin*, 41 Mich., 667. As the patient is at liberty to waive the privilege which the law affords him, at appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit was brought; and if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative."

To the same effect is

Thompson vs. *Ish*, 99 Mo., 160.

In *Hewitt* vs. *Prime* (*supra*), it was held by the court, NELSON, C. J., writing the opinion, "that the physician who had been consulted by the defendant, was not privileged."

"It is very doubtful whether the communication made to him by the defendant can be considered as consulting him professionally, within the meaning of the statute and it is certain that the information given was not essential to enable him to prescribe for the patient."

2 R. S., 406, Sec. 73 (the origin of C. C. P., Sec. 834, N. Y.).

This was an action for seduction of plaintiff's daughter and defendant had told physician of her pregnancy, and asked for means to procure an abortion.

Meyer had expressly agreed to the waiver in question. He waived at best a statutory provision for his benefit, existing in some jurisdictions and not in others; broad in certain states, narrower elsewhere. He received a liberal *quid pro quo* in the cheaper insurance of the contract based upon the exception from the risk of cases where a member's own immoral acts would make that risk the greater, and

the ability of the defendant, under the contract to prove the fact of such immoral acts. And now comes the defendant in error asking the court to say that Meyer's solemn contract is void in that regard, and to lend its aid to the preparation of this great wrong.

But let us see to what extent the courts of New York state have gone in enforcing a waiver once made. An instructive case is that of *Pierson* vs. *The People, supra.* This was an appeal from a judgment of death pronounced upon the rendition of a verdict of guilty, upon the trial of an indictment for murder.

EARL, J., speaking for the court, says, at page 429:

> "One may waive constitutional provisions made for his benefit."
>
> *Lee* vs. *Tillottson*, 24 Wend, 337.
> *Van Hook* vs. *Whitlock*, 26 Wend, 43.
> *The People* vs. *Murray*, 5 Hill, 468.
> *Baker* vs. *Braman*, 6 Hill, 47.
> *Embury* vs. *Conner*, 3 N. Y., 511.

He says:

> "A prisoner may waive a trial by jury and plead guilty; he may waive a plea of *autrefois acquit* by not interposing it or withdrawing it; he may waive or withdraw a challenge to a juror; he could waive his right to have a challenge of a juror for favor tried by triers and consent that it be tried by the court; he may waive objections to improper or incompetent evidence; in a court of special sessions he may waive a trial by jury and be tried by the court; he may waive a challenge to the array of jurors by a challenge to the polls; he could consent to the separation of the jury during the trial, when such separation without such consent would be ground of error. A man can not be legally indicted and tried as accessory to a felon until the

principal be convicted; and yet, if he go to trial without insisting on the objection, he is held to have waived it."

People vs. *M'Kay*, 18 J. R., 212.
People vs. *Mather*, 4 Wend., 229.
People vs. *Rathbun*, 21 Wend., 509, 542.
Stephens vs. *People*, 19 N. Y., 549, 563.
Gardiner vs. *People*, 6 Parker Cr. R., 155.

And in the leading case of *Cancemi* vs. *The People*, 18 N. Y., 128, the Court stated the test of what could not be waived to be twofold:

(*a*) That the state has an interest in the preservation of the lives of its citizens, and will not see them give those lives away, and

(*b*) one can not waive the substantial constitution of the court, nor change its fundamental mode of procedure.

Neither of these exceptions are embraced in the waiver now under consideration, but flatly and clearly, the Honorable Court of Appeals of New York has said that just such a waiver is one, that having been made, must be enforced.

"He may waive objections to improper or incompetent evidence" (*supra*). He may do it when on trial for his life, but, if respondent be correct, not in a contract of insurance, made for his benefit, paid for in cheaper rates and furnishing an incentive not to commit an awful sin and a cowardly crime. Will this stand the test of reason?

Is it not the better described by the court in the Pierson case, *supra*, at page 432, that this waiver "affects no public "interest, trenching upon no public policy, and to hold that "it could not be waived would be without precedent and "against reason?"

If it be said that a method of waiver is provided by the statute, this is not so. It is the contention of the plaintiff

in error that the defendant in error could *not* waive the objection to the physician's testimony, had Meyer not done it for her.

N. Y. C. C. P., Sec. 836.

Meyer is the patient, not the beneficiary. He is not present at the trial. He is dead, and, judicially speaking, lives only in his acts. He has given her no power of attorney to waive for him, and the statute expressly excepts from the power of the legal representative to waive the provisions of Sec. 834, "such facts as would tend to disgrace "the memory of the patient."

The fact sought to be proved is that Meyer wickedly and deliberately committed suicide. Mrs. Henrietta Meyer can not waive Sec. 834 in *that* regard. It can not be contended that it was the purpose of the legislature to prevent any of that fact becoming known, if in the hands of physicians only. Such a fact can only be told by permission of the *patient* himself, *and that permission was produced, offered and without objection accepted at the trial and is part of the evidence upon this record* (fols. 158-159).

"*Cessat ratione, cessat lex.*"

We could not subpœna Emanuel Meyer, who, having succeeded in his nefarious purpose, passed beyond the jurisdiction of the trial court. We did bring there his solemn act and deed, the best that could be done.

> "Into his hand the legislature, having locked the secret, had put the key. He can forego the privilege and unlock the doctor's mouth."
>
> *Dougherty* vs. *Met. Life Ins. Co.*, 87 Hun., 15.

Will this Honorable Court place an impossible burden upon the defendant?

The fact sought to be proved is the suicide of Emanuel Meyer. This, if true, is a fact which disgraces his memory. The proof offered tends to fasten this disgrace upon him. No one but he can waive the objection to the proof. The disgrace is in the success, and that success takes it out of plaintiff in error's power to procure his audible assent to the waiver at the (time and place of) trial. Plaintiff in error offers this pact made with this very thing in view. Is it not sufficient?

And herein is the distinction between the Holden case and the case at bar. In that case the question was a breach of warranty, and whether insured had bronchitis or not, he may have been a decent citizen and a God-fearing man. There was present at the trial one who could waive the prohibition and the defendant was unfortunate in not being able to secure it. This is as though a witness testified in a manner different from the expectations of counsel, and thus he loses his case. But here is the only instance where the one person who can waive the privilege of the witness makes the testimony necessary by his own crime, and the same crime makes impossible the consent for which the statute provides, if defendant in error is correct.

Thus would the law in that regard be a dead letter from its inception, and the legislature, in passing it, stultifies itself.

To sum up: Emanuel Meyer, and he alone, can waive the prohibition of the statute against the testimony of the men to whom he chose to boast of his deed of ill-fame.

Emanuel Meyer has done so, and departed hence. The evidence is, therefore, admissible, and for the error of excluding it this judgment must be reversed, that justice be done, and the plaintiff in error restored to all and singular what it has lost in the premises by the errors aforesaid.

POINT EIGHT.

The evidence was admissible to prove the contract.

The contract provided for the payment of a fixed and definite sum ($2,000), if matured in the course of nature, and a different, but fully as fixed and definite a sum if matured by the act of the member. This is evident from the clause of the application (*supra*).

S. L. K. P. vs. *Clarke*, 88 Ill. App., 600 (*supra*).

Bigelow vs. *Berkshire Life Ins. Co.*, 93 U. S., 284 (*supra*).

Linz vs. *Mass. Mut. Life Ins. Co.*, 8 Mo. App., 363.

By the by-laws of the plaintiff in error (Rec., fols. 41-42), an inflexible, certain and mathematical rule was established by the contract fixing with accuracy and arithmatical exactness the amount of money covenanted to be paid, if the condition subsequent of suicide should mature the contract. The member's expectancy, at entrance into the contract, is known and fixed by his age at such entrance, and thus becomes one of the unchangeable factors in the covenanted liability, depending as it does upon the well known American experience table of mortality then in force. The time elapsed before he matured the contract (in the case of a suicide) lay absolutely in his own hand, and he alone could fix the value of that factor, and the third factor (the face of the certificate in case the contract naturally matured) is also known. To find, therefore, the covenanted liability, and for that purpose to prove the contract, it is necessary to show whether or not it falls within the class of naturally maturing or artificially and immorally maturing contracts.

The evidence of suicide ought, therefore, in any event, to be admissible to prove the contract and show that it was of the "suicide-maturing" and not of the "course of nature maturing" class of contracts, and thus show what *was* the measure of the obligation covenanted and that element of the contract.

POINT NINE.

The trial court erred in excluding the testimony of the witness Bruso.

Griffiths vs. *Met. St. Ry. Co.*, 171 N. Y., 106.
People vs. *Koerner*, 154 N. Y., 355.
Fisher vs. *Fisher*, 129 N. Y., 654.
People vs. *Schuyler*, 106 N. Y., 298.

It is well settled that in order to shut out the testimony of a witness on the ground that it is privileged, the burden is upon the party seeking the exclusion to show that it comes within the prohibition of the statute.

In the Griffiths case, *supra*, Judge WERNER, writing the opinion, says, p. 111:

> "To bring the evidence of a physician within the prohibition of the code section above quoted, three elements must coincide:
>
> "1. The relation of physician and patient must exist.
>
> "2. The information must be acquired while attending the patient.
>
> "3. The information must be necessary to enable the physician to act in that capacity. * * *
>
> "It is the well settled rule that the burden of showing that evidence sought to be excluded under this section is within the prohibition of the statute, rests upon the party seeking to exclude it."

In *People* vs. *Koerner*, *supra*, Judge MARTIN lays down the following rule:

> "Where the testimony of the physician is sought to be excluded under the provisions of that section (834) of the code, the burden is upon the party seeking to exclude it to bring the case within the provisions. He must make it appear not only that the information which he seeks to exclude was acquired by the witness while attending the patient in a professional capacity, *but also that it was necessary to enable him to perform some professional act.*"

In the case at bar the plaintiff below did not even attempt to show that the relation of physician and patient existed between Emanuel Meyer and the witness Bruso. Indeed, it is quite doubtful whether such relationship can arise despite the patient's protest and against his express refusal to be treated. A reading of Dr. Bruso's testimony (which the learned trial court excluded), will show that Emanuel Meyer vehmently and in strong language refused to be treated and thus enter into the relationship. Can it be said that under such circumstances the law will seal the mouth of the physician? Must not the relationship, like that of attorney and client, arise voluntarily; that is, by the consent of the parties? Assuming for the sake of argument that the relation does arise under these circumstances, will it be contended that it is such a case as that contemplated by the statute? At all events, could it arise *against* the *expressed will* of the patient?

It is to be remembered that at common law the physician's testimony was not privileged. The privilege is merely the creation of the statute, and we respectfully contend that that act contemplates a case where the relationship is freely and voluntarily entered into and is designed to pro-

tect those who seek the aid of the physician, *and not where treatment is declined.* If under these circumstances a statement is made, it is respectfully contended that it is admissible in evidence, if otherwise material and relevant.

POINT TEN.

The refusal of the learned trial court to consider the physician's proof of death in evidence constituted reversible error.

It was a condition precedent to any liability on the part of the plaintiff in error that proper proofs of death should be made. As has been shown before (point 1, *supra*), the by-laws in force at the time the contract was entered into are an essential part of the contract between the late Emanuel Meyer and the plaintiff in error by which the defendant in error is bound (see authorities cited under point 1).

Among the by-laws of the society in force at the time of the admission of Emanuel Meyer to membership in its Endowment Rank were the following (fols. 190-192):

"ARTICLE XII.

Proof of Death.

"Section 1. The proof of death shall in all cases be furnished by the beneficiary or beneficiaries on blank forms to be obtained of the Board of Control, and shall contain affidavits of the attending physician or physicians, the undertaker who officiated, the Master of Finance as to the standing of the deceased in the subordinate lodge at the time of death, and from such other person or persons as may be required; affidavits to be made before an officer authorized to take affidavits, and such authority must be certified by the

clerk of a court of record, or other competent authority, under seal.

"Section 2. All necessary legal papers required in order to secure the proper payment of benefits must also be furnished by the beneficiary or beneficiaries, and shall be forwarded with the proof of death to the Board of Control by the Secretary of the Section."

It is earnestly urged upon this Honorable court that the proof of death is therein provided to be furnished in all cases by the beneficiary and on the blank forms *to be obtained* of the Board of Control and the same shall contain the affidavit of the attending physician among other things. If, therefore, the learned trial court was right in excluding the physician's proof of death, which the plaintiff in error does not concede, then it was reversible error for the court to deny the motion (Rec., fols. 140, 141), to dismiss the complaint and we respectfully contend that the defendant in error finds herself in this dilemma; either the physician's proof of death was improperly excluded to the prejudice of the plaintiff in error, for which a new trial should be ordered or the motion to dismiss the complainant upon the ground upon which the same was made should have been granted, and the plaintiff in error's exception in that regard should be sustained and the complainant dismissed by this court. We will not undertake to argue to this Honorable court that where by the terms of the contract, for breach of which recovery is sought, the plaintiff must perform conditions precedent, it is incumbent upon the plaintiff to show performance. There is no strict compliance with the condition precedent of article 12 of the by-laws. There is no substantial compliance with the same. There is no preponderance of evidence that the same was complied with upon the theory of the learned trial court in ex-

cluding the physician's proof of death. But there is flatly upon this record the evidence of the plaintiff below, herself, called by the plaintiff in error, that she did not attempt to comply with the provisions of the by-laws in that regard and the complaint should have been dismissed. If the learned trial court was right in refusing to dismiss the complaint, then it follows, as the night the day, that the physician's proof of death should not have been tossed out of the case by the learned trial justice and the jury not permitted to regard the same.

Further, there was ample to sustain and to make proper, competent, relevant and admissible the very material piece of evidence now under examination. The plaintiff in error was entitled to have it in the case and it is respectfully urged that the judgment founded upon the verdict upon this record can not stand.

Aside from all this, however, it was once in the case and should have remained there (Rec., fol. 61). A cursory glance at the physician's proof of death (Rec., fol. 170), will show how material and necessary it was to the society's contention that Emanuel Meyer committed suicide.

POINT ELEVEN.

Section 836 of the Code of Civil Procedure of the State of New York, as the same existed at the time of the making of the contract in suit, is not construed in the Holden case according to the manifest intent of the Legislature.

The Honorable court, in deciding the Holden case, squarely overruled the decisions of the Appellate Division in the case of:

Foley vs. *The Royal Arcanum, supra,*
Dougherty vs. *Met. Life Ins. Co., supra,*

and reversed the opinion of the Appellate Division in the principal case. The Honorable court went upon the theory that the insertion in the statute of the words "upon the trial" made necessary the actual fact of physical waiver to take place in the presence of court and jury, within the court room, between the times of the commencement and and the finish of the actual trial of the issue.

It is respectfully contended that if the legislature meant that construction to obtain, then the amendment of that section in 1899, after the rendition of the opinion in the Holden case, was a nugatory and self-stultifying act of the legislature in attempting to add to the existing enactment precisely what this Honorable court had already said that section meant. We refer to the sentence then incorporated in the section, which reads as follows:

> "The waiver herein provided for must be made in open court on the trial of the action or proceeding, and a paper executed by a party prior to the trial, providing for such waiver, shall be insufficient as such a waiver."

We further respectfully submit that if this be declaratory of the law as already announced by this Honorable court, that the last sentence in that section, as the same now stands, renders the remainder thereof inconsistent, incongruous and absurd. The sentence to which we beg leave to refer, reads as follows:

> "But the attorneys for the respective parties may, *prior to the trial*, stipulate for such waiver, and the same shall be sufficient therefor."

It would seem, therefore, to be the law of the State of New York, that an agent may do for his principal what the principal may not do for himself, and that if Meyer had caused the waiver in his application to be drawn by his legal agent or attorney, the evidence would have been admissible, under the last sentence of section 836, and that he has no power to do himself what his agent may do for him. We respectfully contend that this reduces the whole proposition upon which the respondent rests to a *reductio ad absurdum.*

POINT TWELVE.

The judgment should be reversed and judgment ordered for the defendant in error upon the offer of judgment for the sum of $363.76 with interest from the twenty-ninth day of September, 1900, to the twentieth day of January, 1902, and her lawful costs which had accrued up to that time, and in all other respects her complaint should be dismissed with costs in all the courts from that time, or a new trial ordered in which the excluded evidence shall be received, and further done herein to correct that error, what of right and according to the laws and customs of the United States should be done.

All of which is respectfully submitted,

CARLOS S. HARDY,
LAURENCE G. GOODHART,
Attorneys for Plaintiff in Error

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 284.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff in Error,

vs.

HENRIETTA MEYER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

REPLY BRIEF OF PLAINTIFF IN ERROR.

POINT ONE.

The Plaintiff-in-Error had a vested right to introduce the excluded medical evidence of which no State could deprive it by any statute.

As has been shown in the brief in chief the contract of assurance in this case was based upon assessments materially smaller than would have had to have been the case had the suicide risk, or the difficulty of proving the suicide in such a State as New York, been included.

The Plaintiff-in-Error had, therefore, purchased exemption from liability to pay the full amount in cases of suicide, **and had also purchased exemption from the**

great difficulty of proving the fact of suicide without the aid of physician's testimony for a good and valuable consideration.

The absolute right of the plaintiff-in-error to have the advantage of the uncontrovertible evidence of suicide contained in the excluded depositions became vested at the birth of the contract. This event took place on September 20, 1894, at Chicago, Illinois, (brief in chief, page 61). No subterfuge of carrying the cause into a particular jurisdiction would enable the Legislature of that State to thwart the contract by any act impairing the obligation of the defendant-in-error to permit the reception of the particular kind of evidence for which the member had contracted.

The plaintiff-in-error had acquired a vested right to introduce the evidence, and the statute cited upon the brief of defendant-in-error (§§ 834 and 836, C. C. P.) impairs that vested right—i. e., impairs the obligation of the contract.

Therefore the writ of error should be sustained, the judgment reversed and the cause remanded for further proceedings not inconsistent with this Honorable Court's opinion herein.

Respectfully submitted,

CARLOS S. HARDY,
LAURENCE G. GOODHART,
Attorneys for Plaintiff-in-Error.

FILE COPY.

Supreme Court of the United States.

No. 884.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff-in-Error,

against

HENRIETTA MEYER,
Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

OTTO H. DROSOP,
J. LAURENCE FRIEDMANN,
Of Counsel for Defendant-in-Error.

APPEAL PRINTING CO., 16-18 VESEY ST., N. Y. CITY

IN THE

Supreme Court of the United States.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS,
Plaintiff-in-Error,

against

HENRIETTA MEYER,
Defendant-in-Error.

No. 234.

Brief of Defendant-in-Error.

This is an appeal by the plaintiff-in-error from a judgment rendered in favor of the defendant-in-error, Henrietta Meyer, and against the plaintiff-in-error, Supreme Lodge, Knights of Pythias in the Supreme Court of the State of New York, held in and for the County of Queens, and entered on the 21st day of March, 1904, which judgment was entered upon a remittitur of the Court of Appeals of the State of New York.

Statement of the Case.

The defendant-in-error brought this action as the beneficiary of a policy issued to her husband, Emanuel Meyer, deceased, by the plaintiff-in-error, the Supreme Lodge, Knights of Pythias,

The plaintiff-in-error is a fraternal mutual benefit corporation, having subordinate local branches (Record, page 4), and issues policies of insurance upon the lives of those of its members who belong to what is known as the "Endowment Rank," which is a subordinate branch of the Supreme Lodge, Knights of Pythias (Record, page 8).

The assured, Emanuel Meyer, at the time of his death, belonged to said Endowment Rank. The Supreme Lodge, Knights of Pythias had issued a policy to said Emanuel Meyer, by which it promised to pay to his wife, Henrietta Meyer, the sum of Two thousand dollars, upon his death (Record, 5).

The policy in this case was issued upon the written application of Emanuel Meyer, dated September 6th, 1894 (Record, 34).

At the time of the issuance of the policy Emanuel Meyer was a member of Independence Lodge, No. 361, Knights of Pythias, of the Grand Jurisdiction of the State of New York (Record, 34). The application was made in the City of New York (Record, p. 36, and Defendant' Answer Record, 7).

The application contained the following provision:

> "It is agreed that membership shall not begin and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the Board of Control and all

required fees and the first monthly payment has been paid to said board."

(Record, 35.)

The application for the policy also contained the following provision:

"I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise from disclosing or testifying to any information acquired thereby, or making any such physician incompetent as a witness, and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material (Record, p. 35)."

The policy was dated September 20th, 1894, at Chicago, Illinois.

(Record, 6.)

The policy contained the following endorsement:

"I hereby accept this certificate of membership subject to all the conditions therein contained."

"Signature of member, Emanuel Meyer. Dated at New York this 28th day of September, 1894.

Attest: Louis Riegel. *Secretary section 2179.*"

This acceptance of the policy on September 28th, 1894, was the last act that was done in connection therewith.

On the 29th day of September, 1900, Emanuel Meyer died in the City of Buffalo, State of New

York. At the time of his death he was a member in good standing of the plaintiff-in-error (Record, 7).

During his last illness Meyer was attended by three physicians. The testimony of these physicians was taken by commission and their depositions are set forth at length in the record.

Trial.

Under the pleadings and the admissions by the defendant, the only question at issue was:

DID THE DECEASED COMMIT SUICIDE?

(Record, 11.)

At the trial of the case the defendant, the plaintiff-in-error in this court, asked for and obtained the affirmative on the ground that it admitted that all the conditions precedent had been complied with by the plaintiff (Record, 14, 31).

The defendant offered in evidence the testimony of certain physicians who had attended Emanuel Meyer, the assured, at the time of his death, and tried to prove by these witnesses that said Meyer had committed suicide (Record, 14).

This testimony was objected to on the ground that it was privileged, being information obtained by the physician while he was attending the deceased in a professional capacity (Record, 14). The testimony was excluded under Sections 834 and 836 of the Code of Civil Procedure of the State of New York, and the defendant excepted.

Issues.

The sole issue in this case upon this appeal is, did the exclusion of such evidence upon the trial of this action pursuant to a statute of the State of New York, which prohibited such testimony impair the obligation of a contract?

The plaintiff-in-error contends that the statute of the State of New York which prohibits such evidence impairs the obligation of a contract, and, therefore, comes within the non-impairment clause of the Constitution.

POINT I.

The contract in question was executed in the State of New York and subsequent to the enactment of the statute of that State, which, it is claimed, impairs the obligation of the contract in question.

Upon the trial of this case in the court below the evidence of certain physicians, who were produced as witnesses by the plaintiff-in-error, was excluded under Sections 834 and 836 of the Code of Civil Procedure of the State of New York.

These sections in the form in which they stood at the time the policy was executed were as follows:

> Section 834: "A person, duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."

Section 836, insofar as it is applicable, is as follows:

> *"The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is diseased, which he acquired in attending such patients professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of Section Eight hundred and thirty four have been expressly waived on such trial or examination by the personal representatives of the deceased patient."*

Section 836, the statute with the construction of which we are now concerned, was enacted as above by Chapter 295 of the Laws of 1893 of the State of New York.

These sections as above set forth were construed by the Court of Appeals of that State in the case of Holden vs. Metropolitan Insurance Company, 165 N. Y., 13.

That case finally settled the law in the State of New York, as to the application of these sections.

In that case the policy of insurance sued upon contained an express waiver of the prohibition given by Section 834 of the Code of Civil Procedure similar to the one contained in the contract sued upon in this case and the defendant insisted that under the provision of Section 836 of the Code of Civil Procedure that waiver was effective. The court, construing the statute as it now stands and as it existed at the time the policy in the

present case was made by the plaintiff in error, said as follows:

> "The statute as it now stands, in positive and express terms, requires the waiver to be made upon or at the time of the trial or examination. Under the statute as amended, no one except the personal representatives of the deceased patient can waive the provisions of Section 834, and it can be waived by them only upon the trial or examination where the evidence is offered or received. The apparent purpose of that amendment was to protect parties, their representatives and successors from waivers which should be inadvertently or improperly obtained previously to the trial of an action or examination of the witness. That in many cases injustice had resulted from such waivers having been previously obtained by a species of fraud or duress, was doubtless the reason which induced the Legislature to adopt this amendment, requiring the waiver to be made in the presence and under the supervision of the court before which the trial or examination was had. Whatever the purpose may have been, the plain effect of this statute was to limit as to the time and place when and where such waiver should be made to be effective in exempting the testimony of such a witness from the inhibition of Section 834. The waiver relied upon by the defendant was made in 1893, while the statute, as amended, was in full force and effect. Hence, it is obvious that the waiver in the application was insufficient under the statute as it then stood to justify the admission of the evidence of Dr. Sweetman, and the court erred in overruling the plaintiff's objections and admitting that proof. These rulings were clearly erroneous and constituted substantial errors for which the judgment herein must be reversed."

The policy in this case was signed by the officers of the plaintiff-in error at Chicago, Illinois, on the 20th day of September, 1894 (Record, 33), and was accepted by Emanuel Meyer, the assured, on the 28th day of September, 1894, at New York (Record, 33). The application for the policy contained the following provision:

> "I hereby, for myself, my heirs, assigns, representatives and beneficiaries expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

The plaintiff-in-error now contends that the prohibition contained in Sections 834 and 836 of the New York Code of Civil Procedure, in view of the above clause contained in the application, impaired the obligation of that contract (Brief of plaintiff-in-error).

If the contract in question was a New York contract, then there can, of course, be no question that the statute which was enacted in 1893 could not impair the obligation of a contract which was not made until 1894.

Lehigh vs. Easton, 121 U. S., 388.

The highest court of the State of New York has found that the contract in question was made in New York.

Opinion of the Court of Appeals in this case

(Record, 51) where the court speaking by Mr. Justice GRAY said:

> "With respect to the first of these questions raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that state. The beneficiary was a resident of this state and there made his application for the insurance. The certificate, issuing upon the application, appears, from its language only, to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant followed by the words 'Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endowment Rank, K. of P.' By the terms of the certificate, the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter namely,' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate, namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that it was binding upon either party to it, until it was delivered in

> New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As a matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms it was first to take effect as a binding obligation, when the required agreement on the part of the member was executed by him."

This finding of fact of the highest court of the State of New York upon this question we submit, is conclusive upon this court.

> Western Union Tel. Co. vs. Gottlieb, 190 U. S., 412.422.
> Dowe vs. Richards, 151 U. S., 658.

The policy fully bears out the construction placed upon it by the Court of Appeals.

The policy was signed by the officers of the Knights of Pythias at Chicago, Illinois, on the 20th day of September, 1894 (Record, 33).

The policy was accepted by Emanuel Meyer, the assured, on September 28th, 1894, in New York City (Record, 33).

The acceptance endorsed on the policy is as follows:

> "I hereby accept this certificate of membership subject to all the conditions therein contained.
> Signature of member: Emanuel Meyer. (seal) Dated at New York, this 28th day of September, 1894.
> Attest: Louis Riegel,
> Sec'y Section No. 2179, Endowment Rank, K. of P."

It is therefore apparent from the record that the last act in connection with this contract was performed at New York.

Moreover, the policy was not to become effective until the first premium thereon had been paid.

The application signed by the assured contained the following provision:

> ' It is agreed that membership shall not begin and the certificate of membership issued under this contract shall not be binding or in force and effect until this application has been accepted by the board of control, and all required fees and the first monthly payment has been paid to said board" (Record, 35).

As the premium was to be paid in New York, where the assured resided, therefore, the place of payment is the place of contract.

As said by this court in Equitable Life Assur. Soc. vs. Clements, 140 U. S., 226:

> Where the question arose whether the contract was made in New York or Missouri. This court found upon that question that nothing appeared in the record as to the place of execution except the policy and application, the petition and answer, whereby it appeared that the assured was a resident of Missouri and the application for the policy was signed in Missouri. The policy was executed at the defendant's office in New York, and provided that the contract between the parties should consist of the policy and the application therefor taken together.

The application declared that the contract

> "shall not take effect until the first premium shall have been actually paid during the life of the person herein proposed for assurance."

The petition alleged that that premium and two annual premiums were paid in Missouri, and that the policy was delivered in Missouri, which was not denied by the answer.

Upon this state of facts this court held:

> "The conclusion is inevitable that the policy never become a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

This is also the law of the State of New York. In Russell vs. Prudential Life Ins. Co., 176 N. Y., 178, the Court of Appeals of New York held that where a policy of insurance contains a clause that it shall not take effect until the first premium is paid in full, the legal effect is that the policy is not binding until the payment of such premium. To the same effect is

> Millard vs. Brayton, 177 Mass., 533.

As to the place of performance of the contract the policy provides as follows:

> "The Board of Control of the Endowment Rank, Knights of Pythias, of the World, will pay to Hattie Meyer, his wife, the sum of $2,000" (fol. 49).

As Hattie Meyer, the wife of the assured, resided in New York (Record, 34) the place of performance necessarily was New York.

The place of performance is ordinarily deemed the situs of an insurance contract.

> Bottomley vs. Met. Life Ins. Co., 170 Mass., 274.

Assuming, therefore, that the policy sued upon was a New York contract, then there can be no question in this case of the impairment of the obligation of a contract.

If, as the plaintiff-in-error now contends, the contract was not executed in New York, then the plaintiff-in-error, upon the trial below having demanded and obtained the affirmative, assumed the burden of proving that fact the same as any other fact constituting its defense.

Lake Ontario Bank vs. Judson, 122 N.Y., 278.

The record also shows that the dues and premiums were paid in New York, a certificate to that effect being made in New York by a person designated as "Master of Finance."

(Record, 41.)

This certificate is as follows:

"State of New York, }
County of New York, } ss.:

Benjamin Hart, being duly sworn, says that he is the Master of Finance of Shakespeare Lodge No. 274, located at grand domain of and that Bro. Emanuel Meyer of said lodge who died on 29th Sept., 1900, was at the time of his death a member in good standing and that his dues were paid to December, 1900.

Benjamin Hart,
Master of Finance."

POINT II.

As the contract sued upon in this case was made subsequent to the enactment of the statute in question the non-impairment clause of the constitution has no application.

The contract in this case was made on September 28th, 1894 (Record, 33). The statute as construed by the court in this case was enacted prior to that time.

> Code of Civil Procedure of the State of New York, Sections 834 and 836.

These sections as they stood at the time of the making of the present contract were construed in the case of

> Holden vs. Metropolitan Life Ins. Co., 165 N. Y., 13.

Therefore, the policy sued upon in this case was made after the enactment of the statute in question.

The non-impairment clause of the Constitution prohibits a State from enacting a law which will impair the obligation of an existing contract. This clause was not intended to prohibit a State from enacting a law prohibiting certain contracts in the future. It was intended as a protection to existing contracts only.

Statutes in existence at the time a contract is made are not void as impairing the obligation of a contract.

> Denney vs. Bennett, 128 U. S., 489.

Such a statute cannot be held to impair the obligation of a contract.

Brown vs. Smart, 145 U. S., 454.

A law in force at the time of making a contract does not impair its obligation.

Ohio, etc., vs. McClure, 10 Wall., 511.
Churchman vs. Martin, 54 Ind., 380.
People's Savings Bank vs. Tripp, 13 R. I., 621.

In the case of

Lehigh Water Co. vs. Easton, 121 U. S., 388,

this court said:

> "The only question presented by the record which this court can properly consider is whether the judgment below denies to the plaintiff-in-error any right or privilege secured by that provision of the Constitution of the United States which declares that, 'No State shall pass any law impairing the obligation of contracts.' Obviously, this clause cannot be invoked for the reversal of the judgment below. It is equally clear that the law of the State to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired. Neither the Lehigh Water Company nor its predecessors had, under any statute enacted prior to 1874, an exclusive right to maintain water works in the Borough of Easton for supplying its inhabitants with water. Nor did the grant to the Borough in the Acts of 1867, of the power to construct and maintain a system of public water works, infringe any right or privilege

> which the plaintiff-in error then had under its charter. But the claim is that the exclusive privilege acquired by the company under the Statute of 1874 was impaired in value by the Acts passed in 1867. It cannot, however, with propriety be said that the obligation of a contract made with the State in 1874 was impaired by statutes enacted in 1867. Whether the former repealed by implication the acts of 1867 presents no question arising under the National Constitution. That is a question simply of statutory construction, which the State court was competent to determine, and whose judgment in respect thereto is not subject to re-examination in this court."

Therefore, whether the contract was made in the State of New York, or was made in the State of Illinois, in neither case has the non-impairment clause any application.

POINT III.

Assuming that the contract was made in Illinois upon an action brought in this State, the rules of evidence of the forum in which the action is brought govern.

The *Lex Fori* governs in all matters relating to the remedy and the course of procedure.

> Northern Pacific R. R. Co. vs. Babcock, 154 U. S., 190.

It has frequently been held that all matters respecting the remedy, such as bringing suits, ad-

missibility of evidence, etc., depend upon the law of the State where the suit is brought.

Miller vs. Brenham, 68 N. Y., 82.
Scudder vs. Union National Bank, 1 Otto, 406.
Clarke vs. Lake Shore T. T. Co., 94 N. Y., 218.
Sturgess vs. Vanderbilt, 73 N. Y., 384.

The rules of evidence adopted by the Legislature of the State of New York govern in a case of this kind, particularly is this true when the rule has been adopted as a matter of public policy. The courts of the State of New York need not enforce the laws of another State, which are contrary to the public policy of the State of New York.

When the defendant came into New York to do business it subjected itself to the laws of that State, which were made for the protection of the citizens thereof. Courts of the State of New York have declared that the section in question was passed as a matter of public policy.

As said in the case of Davis vs. Supreme Lodge, Knights of Honor, 165 N. Y., 159–163, the disclosure by a physician whether voluntary or involuntary of the secrets acquired by him while attending upon a patient in his professional capacity naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.

In the case of Holden vs. Metropolitan Life Insurance Company, 165 N. Y., 13, 17, the court said:

> "The apparent purpose of the amendment was to protect parties, their representatives

and successors from waivers which should be inadvertently or improperly obtained previously to the trial of an action or examination of the witness. That in many cases had resulted from such waivers having been previously obtained by a species of fraud or duress, was doubtless the reason which induced the Legislature to adopt the amendment."

Hoyt vs. Hoyt, 112 N. Y., 493.

The privilege is founded on public policy and in all cases where it applies, the seal of the law must forever remain until it is removed by an act or consent of the patient.

Weston vs. Insurance Co., 99 N. Y., 56.

At common law a penitential confession made to the minister of a person's own church or even a secret confided to a Roman Catholic priest in the course of confession was not regarded as a privileged communication.

Taylor on Evidence, Section 917.

By Section 833 of the Code of Civil Procedure of the State of New York, a minister is not allowed to disclose any confession made to him in his professional character.

According to the contention of the defendant in a case such as the present, a Catholic priest would be compelled to disclose the secrets of the confessional if such sacred confidences were admissible by the laws of Illinois. Upon a suit brought in the Courts of the State of New York,

notwithstanding the express statutory prohibition of the laws of that State.

> "It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted."
>
> Story Conf. of Laws, 7th Ed., Sec. 556.
>
> "The forms of remedies and the order of judicial proceeding are to be according to the law of the place where the action is instituted without any regard to the domicile of the parties."
>
> *Ibid*, Sec. 558.

The rules of evidence applied in a case are part of the law of the forum.

> Wilcox vs. Hunt, 13 Peters, 378.
> Pritchard vs. Norton, 106 U. S., 124.
>
> "The general principle adopted by civilized nations is that the nature, validity and interpretation of contracts are to be governed by the laws of the country where the contracts are made, or are to be performed, but the remedies are to be governed by the laws of the country where suit is brought."
>
> The Bank of the U. S. vs. Donnally, 8 Peters, 361.

POINT IV.

The non-impairment clause of the Constitution has not the slightest application to this case.

Assuming, that the policy in question was executed in the State of Illinois, and that its interpretation is to be governed by the laws of that State; and assuming further that according to the laws of that State the testimony of a physician as to information he had received while attending a patient in a professional capacity was admissible; and assuming further that the courts of New York have erred in refusing to admit the testimony of the physician; still no federal question would be involved.

This court is not here for the purpose of reviewing errors committed by State Courts.

> Lehigh Water Co. vs. Easton, 121 U. S., 388.

The Constitution prohibits a state from passing any law impairing the obligation of a contract; but when a law enacted prior to the making of a contract is invoked to nullify a provision of that contract, then the impairment clause has no application. The State Court has a right to enforce its own laws when passing upon a contract brought before it for adjudication. The State Court is under no obligation to enforce the Laws of another State; it does so only in a spirit of comity and not because of any Constitutional sanction.

The constitutional provision in question contains an inhibition, not a mandate. It prohibits a State fron enacting a law which shall impair the

obligation of a contract. It contains no provision requiring a State to do anything. It is not like the provision which requires a State to give full force and effect to the judgment of a sister State.

The constitutional provision under consideration does not require a State to give full force and effect to a contract executed in another State. The courts of a State may refuse to enforce a contract executed in another State and still no federal question would be involved. So long as the State passes no law affecting the obligation of a contract, the constitutional provision prohibiting the impairment of the obligation of a contract is not violated, and no ground for federal interference is shown.

Comity requires the Courts of the State of New York to interpret a contract made in Illinois according to the Laws of that State. But if the Courts of the State of New York radically err in so doing, or even if they refuse to interpret an Illinois contract according to the Laws of that State, yet the judgment would not be reviewable by this court.

Lehigh vs. Easton, 121 U. S., 388.

A judgment of a State Court cannot be reviewed because it refuses to give effect to a valid contract, or because the judgment impairs the obligation of a contract. It must be a Statute of a State which impairs the obligation of a contract.

Knox vs. Exchange Bank, 79 U. S., 379.

POINT V.

The judgment appealed from should be affirmed.

OTTO H. DROEGE,
J. LAWRENCE FRIEDMANN,
Of Counsel for Defendant-in-Error.

[6735]

Supreme Court of the United States.

No. 234.—October Term, 1904.

The Supreme Lodge, Knights of Pythias, Plaintiff in Error, *vs.* Henrietta Meyer.	In error to the Supreme Court of the State of New York.

[May 29, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

The plaintiff in error is a corporation organized under an act of Congress approved June 29, 1894. This action was brought against it by defendant in error as payee in a certain benefit certificate issued by it to Emanuel Meyer, husband of Henrietta Meyer, dated September 20, 1894, whereby it insured his life in the sum of $2,000. The defendant in error obtained judgment, which was successively affirmed by the Appellate Division and by the Court of Appeals of New York. The judgment of affirmance was entered in the Supreme Court, to which the case was remitted, and this writ of error was then sued out.

There are two questions in the case, the place of the contract and the effect of the following provision in the certificate of insurance:

"And I hereby, for myself, my heirs, assigns, representatives and beneficiaries, expressly waive any and all provisions of law, now or hereafter in force, prohibiting or excusing any physician heretofore or hereafter attending me professionally or otherwise, from disclosing or testifying to any information acquired thereby, or making such physician incompetent as a witness; and hereby consent that any such physician may testify to and disclose any information so derived or received in any suit or proceeding wherein the same may be material."

This provision takes pertinence from another, whereby "it is agreed that if death shall result by self-destruction, whether sane or insane," the certificate "shall be null and void, and all claims on account of such membership shall be forfeited."

The case was submitted for a special verdict on the question "did Emanuel Meyer, the husband of the plaintiff in error, commit suicide?" The jury answered "No."

On the trial plaintiff in error offered the testimony of three physicians who attended Meyer, as to declarations made by him tending to show that he had taken poison with suicidal intent. It appeared that Meyer did not request the attendance of the physicians—indeed, protested against treat-

ment. The testimony was excluded under sections 834 and 836 of the Code of Civil Procedure of the State. Section 834 forbids any physician "to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," and section 836 provides that section 834 applies "unless the provisions thereof are expressly waived upon the trial or examination . . . by the patient. . . . But a physician . . . may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patients professionally, except confidential communications, and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient."

The Court of Appeals held that the physicians were "attending a patient in their professional capacity;" that the information that they acquired "was necessary to enable" them "to act in that capacity," and that their testimony was therefore properly excluded under sections 834 and 836. The court also held that the certificate of insurance was a New York contract. Judge Gray and Chief Judge Parker concurred in the former view, but dissented as to the application of the code sections. Plaintiff in error contests both sections. The argument is that (1) it appears from the testimonium clause of the certificate of insurance that it was signed and sealed by plaintiff in error at Chicago, Illinois, and hence is an Illinois contract, and must be construed with regard to the law of that jurisdiction, and as there is no evidence of what that law is it must be assumed to be what the common law of the State is, and under that law the testimony of the physicians was admissible. (2) We quote counsel: "The attempted application of sections 834 and 836 of the Civil Code of Procedure of the State of New York to the contract in the case at bar is a violation of the Federal Constitution."

These contentions may be said to have the same ultimate foundation, but regarding them as separate and independent, the first is based on the ground that plaintiff in error derived the right from its contract with Meyer to the testimony of the physicians, which right attended the contract in whatever forum suit upon the contract might be brought. This is certainly debatable. The general rule is that all matters respecting the remedy and admissibility of evidence depend upon the law of the State where the suit is brought. (*Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Wilcox* v. *Hunt*, 13 Pet. 378; *Pritchard* v. *Norton*, 106 U. S. 124; *Bank of the United States* v. *Donnally*, 8 Pet. 361.)

However, if the certificate of insurance is not an Illinois contract, all the questions which depend upon that become irrelevant. We think it is

not an Illinois contract. Judge Gray, expressing the opinion of the Court of Appeals, disposed of the contention that the certificate of insurance is an Illinois contract briefly but completely. The learned judge said:

"With respect to the first of these questions [that the legislation of New York impaired the obligation of the contract between plaintiff in error and Myer] raised by the appellant, whatever other answers might be made to the applicability of the provision of the Federal Constitution relied upon, it is sufficient to say, now, that this contract was consummated in the State of New York and is to be governed, in its enforcement, by the laws of that State. The beneficiary was a resident of this State and there made his application for the insurance. The certificate, issuing upon the application, appears, from its language only to have been signed by the officers of the defendant at Chicago, in the State of Illinois, on September 20th, 1894; but upon it was printed the following clause: 'I hereby accept this certificate of membership subject to all the conditions therein contained,' and that had the signature of the applicant followed by the words, 'Dated at New York, this 28th day of September, 1894, attest: Louis Riegel, secretary section 2179, Endownment Rank, K of P.' By the terms of the certificate the agreement of the defendant was subject, not only to the conditions subscribed to by the member in his application, but 'to the further conditions and agreements hereinafter named,' and the clause containing his acceptance, above quoted, was one of those 'further agreements.' From these terms of the agreements of the parties the only natural conclusion is that the place of the contract was where it was intended, and understood, to be consummated. Its completion depended upon the execution by the member of the further agreement indorsed upon the certificate: namely, to accept it 'subject to all the conditions therein contained.' The contract was not completed, in the sense that it was binding upon either party to it, until it was delivered in New York after the execution by the member of the further agreement expressing his unqualified acceptance of its conditions. As a matter of fact, the promise of the defendant was to pay the insurance moneys to the plaintiff, who resided in New York; a feature giving additional local coloring to the contract. But the sufficient and controlling fact is that, by its terms, it was first to take effect as a binding obligation, when the required agreement on the year of the member was executed by him."

2. The ground of this contention is not made clear. The language of counsel points to the contract clause of the Constitution as that relied on, and to render it available makes the law of Illinois the obligation of the contract of insurance. But this can only be upon the supposition, which we have seen is erroneous, that the certificate of insurance was an Illinois contract, not a New York contract. Being a New York contract, the code sections did not impair its obligation. They were enacted before the contract was executed, and if they were a valid exercise of legislative power, and we have no doubt they were, it was competent for the State to enact the rule of evidence expressed in them. The case is in this narrow compass, and we need not further follow the details of the argument of counsel that the obligation of the contract of insurance was impaired.

But we may observe that there is no question in the case of the validity or the enforcement of the provision in the certificate of insurance against suicide. It is only of the testimony offered to prove suicide. Plaintiff in error sought to prove it by the testimony of a physician, and the attempt encountered the New York Code and the questions we have discussed.

Plaintiff in error further contends that, as in writs of error to the Circuit and District Courts of the United States, we are not restricted to constitutional questions, so in writs of error to a State court we may also decide all questions presented by the record and that it is open for us to decide whether the relation of doctor and patient existed between one of the witnesses and Meyer. This is attempted to be made out by that part of section 709 of the Revised Statutes, which provides: "The writ [to the final judgment or decree of a State court] shall have the same effect as if the judgment or decree complained of had been rendered or passed on in a court of the United States."

However this may be, in cases like that at bar, we accept the construction the State courts give to State statutes. It is manifest that the question submitted involves the construction of the State statute. Plaintiff in error is not helped by the decision in *Foley* v. *Royal Arcanum*, (151 N. Y. 196.) It was there decided that a waiver in a policy of insurance was valid under sections 834 and 836, as they then stood, and their subsequent amendment did not affect the waiver. But the certificate of insurance in the case at bar was made after the amendment to section 836. In *Holden* v. *Metropolitan Life Ins. Co.*, (165 N. Y. 113,) it was held that the statute, by virtue of the amendment, "in positive and express terms, requires the waiver to be made upon or at the time of the trial or examination," and "no one, except the personal representatives of the deceased patient, can waive the provisions of section 834, and it can be waived by them only upon the trial or examination where the evidence is offered or received." *Foley* v. *Royal Arcanum* was referred to and limited to the construction of the statute as it stood before amendment. The opinion of the Court of Appeals in the case at bar follows the Holden case and distinguishes prior cases.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.